

United States District Court  
Southern District of California

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. ) Case No. 10-CR-4246 JM  
 ) Status Hearing  
BASAALY SAEED MOALIN, ) Friday, January 25, 2013  
MOHAMED MOHAMED MOHAMUD, )  
ISSA DOREH, )  
AHMED NASIR TAALIL MOHAMUD, )  
 )  
Defendants. )  
\_\_\_\_\_ )

Before the Honorable Jeffrey T. Miller  
United States District Judge

Official Court Reporter: Debra M. Henson, CSR, RPR  
U.S. Courthouse  
221 W. Broadway, Suite 5190  
San Diego, CA 92101  
(619) 238-4538

Record produced by stenographic reporter

1   Appearances

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1                   San Diego, California - Friday, January 25, 2013

2                   THE CLERK:   Calling matter 2 on calendar,  
3 10-CR-4246, USA versus Basaaly Saeed Moalin, Mohamed Mohamed  
4 Mohamud, Issa Doreh, Ahmed Nasir Taalil Mohamud, set for  
5 status hearing.

6                   MS. FONTIER:   Do you mind if I speak to Mr. Moalin  
7 for one minute?

8                   THE COURT:   Sure.   Counsel, would you state your  
9 appearances, please.   We have Ms. Fontier for Mr. Moalin.

10                  MR. COLE:   Yes, your Honor.   William Cole, Caroline  
11 Han, and Steven Ward for the United States.

12                  THE COURT:   Thank you.

13                  MR. DRATEL:   Good afternoon, your Honor.   Joshua  
14 Dratel for Mr. Moalin as well.

15                  MS. MORENO:   Good afternoon, your Honor.   Linda  
16 Moreno on behalf of Mr. Mohamed Mohamud.

17                  MR. GHAPPOUR:   Good afternoon, your Honor.   Ahmed  
18 Ghappour for Issa Doreh.

19                  MR. DURKIN:   Judge, Tom Durkin on behalf of Ahmed  
20 Nasir Taalil Mohamud, who's present in custody.

21                  THE COURT:   Thank you.   Okay.   Gentlemen, good  
22 afternoon to you.   Okay.   We have some matters to cover  
23 today.   I understand we're without a Somali interpreter, but,  
24 once again, Mr. Durkin, just to review, you were -- you  
25 waived the presence of a Somali interpreter today.

1           MR. DURKIN: I forgot. I forgot to tell him that,  
2 Judge.

3           THE COURT: Mr. Dratel, you made it just under the  
4 wire.

5           MR. DRATEL: Yes, your Honor, I --

6           THE COURT: Must have been a real adventure for you  
7 today.

8           MR. DRATEL: Well, I thought it was going to be  
9 much better until we sat on the tarmac at the jetway for ten  
10 minutes before they opened the door.

11          THE COURT: Okay. I thought -- with all the  
12 weather, I thought it might be a challenge for you to be  
13 here, but I'm glad you were able to make it. Okay.

14          Well, we do have several matters we should cover  
15 today, many of them are of an administrative quality or  
16 character, and then we have some matters that we can perhaps  
17 take available time to discuss that may be a little bit more  
18 substantive.

19          First thing I'd like to do is to basically talk  
20 about jury selection. I'm sure you're all curious as to  
21 exactly how this is going to happen over the course of a  
22 couple of days. I'd like to give you as much information as  
23 I can, as much of a head's up as I can, understanding that  
24 I'm going to be repeating this process more or less as we go  
25 along so that you know what's coming up just before it does

1 come up. And within that -- within that general discussion  
2 I'd like to review any questionnaire issues and proposed voir  
3 dire issues. So that's pretty much what I'd -- how I'd like  
4 to spend the first part of our session today, and then we  
5 will move to other areas, but let's talk about jury selection  
6 and issues related to jury selection.

7 First of all, let me get out my copy of the  
8 questionnaire that you were good enough to prepare after our  
9 last session where I made some suggestions and requests. I  
10 think there were only a couple of issues at this point from  
11 what I can see, and so if we can turn to the parties'  
12 proposed juror questionnaire, which is document 251, I'll  
13 address those last few issues. And I'll wait until you're  
14 all there. If you're there, we can proceed.

15 MS. MORENO: Yes, your Honor.

16 THE COURT: Okay. Question 4 is -- each side has  
17 staked out a position. The United States's position states  
18 that the reference to Christian fundamentalists should be  
19 basically removed because it singles out a particular  
20 religious persuasion and might make jurors feel discriminated  
21 against and then add, should the Court disagree that that is  
22 the case, that other persuasions such as atheists should be  
23 included. The defense position is Christian fundamentalists  
24 should remain in the question.

25 I've given this some thought. It goes on, the

1 position goes on from there, a movement closely identified  
2 with the political right wing, i.e., moral majority, Pat  
3 Robertson, Jerry Falwell, et cetera. And there's a further  
4 indication that the defense has no objection to including  
5 atheists. You know, the question itself really gets to a  
6 political identification and not really religious  
7 identification. I think maybe that was lost sight of a bit  
8 by the parties here. So rather than Christian  
9 fundamentalists, I think a reference to Christian  
10 conservatives would be appropriate because the modifier is  
11 "Christian," but the noun, the category here, once again,  
12 would be conservative. And this is a politically calibrated  
13 question, not a religious one. The Christian conservative  
14 movement is often referred to in political columns, blogs,  
15 writings, discussions as being illustrative of a particular  
16 political persuasion whereas Christian fundamentalists  
17 doesn't tell you too much about -- well, let me say that it  
18 doesn't tell you as much as people who would identify  
19 themselves as Christian conservatives. So I would ask that  
20 that be modified.

21           Where you have liberals -- I guess the new term for  
22 liberals being used more and more would be progressives, so  
23 liberals/progressives. Perhaps conservatives have been  
24 successful in creating the L word as a pejorative term,  
25 but -- I don't know what's happened there, but in any event,

1 it should be liberals/progressives.

2 MR. DURKIN: So you know, Judge, I refuse to be  
3 called a progressive; I'm still a liberal.

4 THE COURT: That really doesn't surprise me, Mr.  
5 Durkin.

6 MR. DURKIN: I didn't think it would, but I didn't  
7 want you to think I was asleep.

8 MR. DRATEL: I didn't know you moved to the right.

9 THE COURT: Fair enough. Fair enough. I don't  
10 know how progressives would define themselves; I would  
11 imagine they're inclusive of liberals, but I don't know if  
12 there's --

13 MS. MORENO: It's a big tent, your Honor.

14 THE COURT: It's a big tent. Okay. Good. And I  
15 see no need to include any reference to atheists because,  
16 once again, that's strictly a religious connotation; I  
17 daresay atheists probably find themselves spread out a little  
18 bit on the political spectrum, so we'll eliminate any  
19 reference to atheists. Okay. That takes care of question 4.

20 Question 39 was an area that I suggested I would  
21 basically cover often and with different variations on the  
22 theme. I think that's the government's position, that that  
23 was the government's understanding that this would be handled  
24 by the Court in its own voir dire, and so I see -- I see no  
25 necessity to have it in, but I have no objection to it

1 either; so we can leave it in, but of course you know that  
2 this is something I'm going to be following up on.

3           The last question -- I don't know that it's  
4 numbered. This is on page 4. Does it have a numerical --  
5 oh, it's a proposed question. All right. Do you have any  
6 experiences, feelings, impressions, or beliefs about the  
7 FBI -- about how the FBI investigates terrorism cases, et  
8 cetera. The government's position is this is an appropriate  
9 question because of the agency involved, and I would assume  
10 because there would be a number of witnesses being called  
11 from the FBI; is that correct?

12           MS. HAN: Yes, your Honor.

13           THE COURT: The defendants object that the question  
14 is duplicative of previous questions. I see no harm in  
15 asking this. It can be added as an additional question.  
16 That takes care of what was proposed. And then I was going  
17 over the exhibit, the proposed questionnaire attached to the  
18 joint submission as Exhibit 1, and I did have a few things I  
19 needed to point out, counsel.

20           The first item would be under news sources on page  
21 6 of document 251-2, question 30. I see that there's no  
22 reference to radio, and I daresay that many people get their  
23 news in part from radio, particularly National Public Radio.

24           MS. MORENO: Well, yes.

25           THE COURT: Ms. Moreno, did you wish to be heard?



1 MS. MORENO: We actually address it in question 31,  
2 your Honor, the very next question.

3 THE COURT: Well --

4 MS. MORENO: But if the Court --

5 THE COURT: -- I took that -- I took that to mean  
6 political people --

7 MS. MORENO: Okay.

8 THE COURT: -- from Rush Limbaugh to people on the  
9 other end of the spectrum, if there are any of those left, as  
10 political commentators, talk radio. I wouldn't identify --

11 MS. MORENO: I agree, your Honor.

12 THE COURT: -- NPR as talk radio.

13 MS. MORENO: I agree.

14 THE COURT: Okay. I think primarily it's news and  
15 feature-related. So if you could add that, that might be  
16 appropriate.

17 MS. MORENO: Yes.

18 THE COURT: I think I'd have -- if I were being  
19 asked that, I would have to check that box in a very  
20 prominent way. Okay. Continuing on, on page 8 under the  
21 heading experiences with law enforcement and the legal  
22 system, specifically the question about halfway through  
23 there -- this is question 40 -- if prior experience as a  
24 criminal case juror, did your trial reach a verdict, yes, no.  
25 That's fine, but in parens you should also add "Please do not

1 disclose what the verdict was," once again for obvious  
2 reasons.

3 I think that's all I had on the proposed  
4 questionnaire. Were there any other issues about the  
5 questionnaire before we leave that subject where counsel wish  
6 to be heard? Ms. Han, is that --

7 MS. HAN: No, your Honor.

8 THE COURT: -- your bailiwick today? Okay. And I  
9 see no one from the defense indicating a desire to be heard.

10 MS. MORENO: Nothing further on the questionnaire.

11 THE COURT: Very good. Thank you. Proposed voir  
12 dire, let's move to that then. I'll go over the government's  
13 first. It's very short, very generic. I see no issues or  
14 potential problems with any of that. In one way or another,  
15 I would cover these areas at appropriate points during jury  
16 selection, so five questions seem to be appropriate.

17 Then we get to the defense submission, and I do  
18 need to alert you to a couple of issues here. First of all,  
19 I don't have many pet peeves, but one of them is asking --  
20 counsel asking questions in voir dire that tend -- that have  
21 a tendency to indoctrinate jurors or to ask prospective  
22 jurors to prejudge evidence -- in this case you'll hear this,  
23 how do you feel about that? -- or variations on that theme.  
24 And basically I ask that you not try your case when you're  
25 engaged in voir dire.

1           That being said, if we can turn to page 2 of  
2 proposed voir dire by the defense -- this is document 255 --  
3 there's some -- there is a heading entitled Beliefs regarding  
4 al-Shabaab; there's only one question actually related to  
5 that. The first part of it I don't have a problem with; it  
6 reads, the charges in this case involve material support of  
7 al-Shabaab, designated by the United States as a foreign  
8 terrorist organization. Do any of you have any beliefs or  
9 impressions regarding al-Shabaab that would affect how you  
10 would view the evidence in this case and how you would view  
11 the defendants?

12           Up to that point I don't have any concern, but the  
13 following language, "despite what information you may hear in  
14 court," I know it wasn't your intention to have jurors commit  
15 to any particular point of view, but if the question here is  
16 will their -- any impressions regarding al-Shabaab, you know,  
17 they may have would affect how they view the evidence and  
18 they say well, they have a -- they have some vague impression  
19 about al-Shabaab and they can set it aside and view the  
20 evidence fairly, then the terminology "despite what  
21 information you may hear in court," I mean is just out there  
22 and I think somewhat meaningless. If I could suggest that  
23 you substitute this language: "that is, can you fairly judge  
24 any such evidence along with all the other evidence in the  
25 case?" At least you're inquiring as to whether or not they

1 have any preconceived notions about al-Shabaab that could get  
2 in their way of being fair, which is I think the primary  
3 purpose of the question. So strike that -- strike the  
4 language "despite what information you may hear in court" and  
5 either end the sentence there or put in "that is, can you  
6 fairly judge such evidence along with all the other evidence  
7 in the case?" Then you had "beliefs regarding al-Qaeda," and  
8 I'm going to come back to that in a bit.

9 MS. MORENO: Your Honor, if I may -- I'm sorry.  
10 Going back to the al-Shabaab paragraph.

11 THE COURT: Right.

12 MS. MORENO: I'm fine with just ending it after the  
13 word "defendants" and striking that and not including what  
14 your Honor has suggested --

15 THE COURT: That's fine.

16 MS. MORENO: -- because I believe that we can get  
17 to what we need to, which is ideas or prejudices that cannot  
18 be set aside --

19 THE COURT: Okay.

20 MS. MORENO: -- merely in a few minutes of asking  
21 questions.

22 THE COURT: Okay. Anything from the government on  
23 that particular point?

24 MS. HAN: No, your Honor.

25 THE COURT: Okay. I'll get back to al-Qaeda, or

1 al-Qaida, in a bit. Let's go over that for -- set that aside  
2 for a bit. The next issue I have is First Amendment  
3 protections. This whole section I have difficulty with  
4 because I think it's confusing and argumentative, and it  
5 implies that supporting terrorism is nothing more than  
6 freedom of speech. The defendants are not charged with  
7 criticizing the United States government in its case; they  
8 are charged with providing material support to terrorists and  
9 terrorist organizations, so I think it's confusing the way it  
10 is right now and I'm going to ask you to remove that.

11 MS. MORENO: May I be heard briefly, your Honor?

12 THE COURT: Yes.

13 MS. MORENO: We now know, because of what the  
14 government has told the defense, that they intend to  
15 introduce conversations that actually touch upon many  
16 discussions about politics, including the politics of the  
17 United States with respect to their support of Ethiopia and  
18 their role, if any, in the conflict over there, and I think  
19 it's appropriate for us to inquire whether that discussion  
20 alone is viewed by a juror -- if -- if the juror is of a mind  
21 that if a discussion is critical of this government, then  
22 they have a prejudice against that, against the speaker or  
23 the person who holds those beliefs, we're entitled to know  
24 that I believe. Of course we're not saying that -- we know  
25 what the charges are, and we've -- I wrote the questionnaire.

1 It's throughout, it's replete in the questionnaire, and the  
2 juror or the prospective juror that's signing it will know  
3 what the charges are. I believe this is an important area  
4 that the defense should be allowed to go into. And if I may,  
5 just briefly, the B and C, these are questions that I have  
6 asked in --

7 THE COURT: Let's deal with B first because I  
8 wanted to ask you something about C.

9 MS. MORENO: Okay.

10 THE COURT: How does this go? How does this  
11 question go then, Ms. Moreno? What are you proposing here?

12 MS. MORENO: Because merely the fact that these  
13 gentlemen are charged with material support of terrorism,  
14 merely that fact alone will affect -- would affect anyone and  
15 will affect these panel members, and so --

16 THE COURT: What are you saying, that charges of  
17 terrorism would affect panel members? You know, yeah, it may  
18 affect them one way or the other when they're reaching a  
19 verdict in the case; I mean they're looking at the evidence  
20 and comparing it to the charges.

21 MS. MORENO: Well, if --

22 THE COURT: Look, if what you're saying is -- well,  
23 first of all, let me ask the government, are you intending to  
24 introduce evidence of calls made, intercepts, where any or  
25 all of these gentlemen were critical of the government of the

1 United States? Is that what you're intending here? Do you  
2 see that coming in? Do you see this being an issue?

3 MS. HAN: Your Honor, I don't believe so. What I  
4 do believe is in the evidence is general beliefs, there are  
5 discussions of interests that the United States may have  
6 interests in, and so about the question that Ms. Moreno  
7 specifically stated, you know, bias and support of people who  
8 criticize U.S. interests or something like that, she can  
9 certainly ask that question, we have no opposition to that,  
10 but specifically though these questions are addressed under  
11 the First Amendment protections header; they don't address  
12 any of those issues that she just stated, and we don't  
13 believe that the First Amendment, as you said, has anything  
14 to do with the defense to this crime or anything in this  
15 case, so for those reasons we do object to these questions.

16 THE COURT: Well, my point is this. You know, if  
17 in fact you want to reiterate with prospective jurors the  
18 First Amendment right of freedom of speech, freedom of  
19 expression, however you'd like to couch it, and emphasize  
20 that this is not a case where that's being -- they're not  
21 being charged with that, and was there anyone here who would  
22 form a negative impression if they were to hear any of these  
23 individuals speaking critically of the United States such  
24 that they couldn't judge the evidence fairly related to the  
25 charges, I think that's okay. But here I get the

1 impression -- I mean this is confusing. It just conflates --  
2 it conflates freedom of speech with terrorism charges, with  
3 providing material support. There's nothing about providing  
4 material support to terrorists or a terrorist organization  
5 that is protected by the First Amendment.

6 MS. MORENO: Well, your Honor, I think that Ms. Han  
7 actually answered your question when you asked her if they're  
8 going to introduce conversations that talked that touched  
9 upon criticisms of the United States, and they are, they are,  
10 they absolutely are. There is a number of conversations --  
11 it's not the focus of the conversations, but it's touched  
12 upon, and they make a big deal about it, and they will make a  
13 big deal about it to the jury, and I feel we're entitled to  
14 talk to the jurors on this issue. I take the Court's  
15 recommendation, and I think the defense would be happy to ask  
16 the question the way the Court has designed it.

17 MR. COLE: Your Honor, if I can just say the  
18 fact -- the problem is if they link it to the First  
19 Amendment, it will leave the impression with the jury, which  
20 will be nowhere in the jury instructions and which isn't the  
21 law -- it will leave the impression that words stated in the  
22 very phone call that prove conspiracy, intent, and knowledge,  
23 that those words stated are somehow protected and can't be  
24 used as evidence in the case because of the First Amendment.  
25 That's what's trying to be indoctrinated in this question,



1 and it's wrong. There should be absolutely no mention of the  
2 First Amendment at all. The words "First Amendment" have no  
3 relationship to anything in this case or any legal  
4 instruction in the case. And so from that standpoint, they  
5 ought to ask there as to -- you may hear -- if you hear that  
6 there's criticism of the United States -- I'm not sure how to  
7 ask that question, frankly, but it shouldn't be tied to the  
8 First Amendment because all of those statements that are  
9 critical of the United States, to the extent they're  
10 admitted, those are evidence we can use against them in the  
11 charges. And if they leave the impression that somehow  
12 that's protected speech and can't be used, that would be a  
13 wrong legal instruction.

14 THE COURT: Well, you say that there is evidence  
15 that the defendants are critical of the United States, and  
16 you say that can be used as evidence; I don't know that  
17 that's accurate.

18 MR. COLE: Well, let me --

19 THE COURT: Or what are you referring to?

20 MR. COLE: If I can give you an example, if I can  
21 give you an example. There's an example where Mr. Moalin  
22 tells Aden Ayrow that you ought to watch out for American  
23 helicopters and shoot them down. Now, that's critical of the  
24 U.S., but certainly it's not protected by the First  
25 Amendment, and it's evidence we can use in our argument and

1 in our case.

2 THE COURT: Yes. See, I don't see that as  
3 criticism --

4 MR. COLE: Well, they're going to --

5 THE COURT: -- of the United States.

6 MR. COLE: Then I don't know what they're talking  
7 about with --

8 THE COURT: Those are verbal acts.

9 MR. COLE: Then I don't know what they're talking  
10 about.

11 MR. DRATEL: I'll give you an example, your Honor.

12 In the conversation where Mr. Moalin talks about the United

13 States and says the United States has problems, and the

14 economy's weak and things like that and also there's

15 criticism and they about -- there's mention of the Iraq war

16 at one point and there's mention of Palestine-Israel issues

17 at one point. What we're concerned about -- and by the way,

18 there is a legal doctrine about the First Amendment in 2339

19 (b), 2339 (b)(i), that nothing in this statute should be

20 construed to infringe on First Amendment protections. So

21 it's right there. And the problem is -- and I think that's

22 what that statute recognizes -- is that there is a danger

23 that a jury hearing speech critical of the United States that

24 is protected speech in and of itself -- I'm leaving out the

25 evidentiary use because I think the Court will be able to do

1 that in instructions -- but just to substitute for elements  
2 that are not satisfied about the statute because of this  
3 criticism of the United States that they will bear an  
4 impression of the defendants that will reduce the  
5 government's burden, that's -- that's our problem. Is  
6 that -- yes. And even, your Honor -- so even a vocalized or  
7 verbal support of al-Shabaab does not violate the material  
8 support statute. In fact, even being a member of al-Shabaab  
9 does not violate the material support statute. One has to  
10 provide material support as it's defined in the statute to  
11 violate the statute. So if someone who says I'm in favor of  
12 what al-Shabaab is doing in a particular context is not  
13 providing material support, and I think the jury has to be  
14 cautioned about not making that leap, which is dangerous.  
15 That's why a terrorism case is dangerous in the context of  
16 First Amendment because they often involve political ideas  
17 that sometimes they merge in their own way.

18 THE COURT: Well, I tell you what. Given -- given  
19 the differences between the parties, this is something I'm  
20 going to handle, and if after I handle it you feel that you  
21 need to explore it in such a way that in my view would create  
22 confusion or indoctrinate jurors, then I'll let you know;  
23 I'll say please stay away from that area. But I'll take a  
24 crack at this and I think should have some success with  
25 conveying the principle that you've just discussed --

1 MR. DRATEL: Okay.

2 THE COURT: -- Mr. Dratel --

3 MR. DRATEL: Thank you very much.

4 THE COURT: -- and Ms. Moreno, which is basically  
5 this, that what is protected is somebody generally  
6 criticizing the United States or any policies of the United  
7 States; that's permitted, and it's permitted whether it's  
8 done by someone who's a terrorist, a charged terrorist, or  
9 not any kind of a terrorist. I think that's the point you're  
10 trying to make. And without getting too deeply into the  
11 evidence within the context of -- without getting into the  
12 evidence at all, frankly, within the context of voir dire, I  
13 think it can be handled more or less along those lines, and  
14 as I say, I'll try to take a crack at it myself.

15 MS. MORENO: Thank you, your Honor.

16 THE COURT: One thing I want to do is to give both  
17 sides an opportunity to participate in this thing without one  
18 side or the other objecting while the questions are being  
19 asked or without, frankly, the Court having to step in and  
20 say look, this is not an appropriate inquiry or please don't  
21 ask the question. Okay. On C, which if any of the  
22 defendants are non U.S. citizens?

23 MS. MORENO: My client is not a U.S. citizen.

24 THE COURT: And only your client, Ms. Moreno?

25 MS. MORENO: I don't know.

1 MR. DURKIN: My client is not either, Judge.

2 THE COURT: Okay. Then I think this -- I think  
3 this is a fair question, and I'll take a crack at it as well.  
4 Is that --

5 MR. COLE: That was not --

6 THE COURT: -- coming out at all? I mean would  
7 that come out in the evidence?

8 MS. MORENO: Oh, yes, your Honor. We've got --  
9 I've got discovery that they're going to introduce some INS  
10 documents that --

11 MR. COLE: It will --

12 MS. MORENO: Excuse me. -- around my client's --

13 THE COURT: So the answer is yes --

14 MS. MORENO: Yes, yes.

15 THE COURT: -- as far as you're concerned. Mr.  
16 Cole?

17 MR. COLE: Yes.

18 THE COURT: Okay. Thank you. I'll attempt to  
19 address that. Thank you. And on the next question, language  
20 use issues, what is meant by the tone? Would you define  
21 "tone"?

22 MS. MORENO: I'm sorry, your Honor?

23 THE COURT: The word "tone" on line 5 of page 3.

24 MS. MORENO: Sure. Well, your Honor, tone gives  
25 meaning to the words. So, for instance, when I was married,

1 if I said "I could just kill my husband" and I had a certain  
2 sarcastic tone, people who were hearing me -- or "I'm going  
3 to kill my husband," people who were hearing me would know  
4 that I was -- just had a frustrating day or what have you.  
5 But on paper that's being used as my -- as evidence of intent  
6 for a particular crime, I think it's very different. So I'm  
7 just -- all we want to know is will the jury allow -- and  
8 clearly in the transcripts that we've gotten, their linguist  
9 describes laughing, giggling, et cetera, so I just believe  
10 it's an inappropriate area of inquiry, right, particularly in  
11 the foreign language context exactly.

12 MS. HAN: Your Honor, if we could be heard briefly.  
13 Your Honor, what I understand that Ms. Moreno is asking is  
14 that she has questions about the context of a call  
15 essentially; that's what her question is about. Your Honor,  
16 in this case the jury's going to hear the audio for itself.  
17 If she has questions about the jurors' ability to understand  
18 that a statement should not be seen in a vacuum and that  
19 there's context, that's a question that certainly could be  
20 asked, but the way that it is phrased about whose belief  
21 about the tone of a conversation, that is an attempt to  
22 indoctrinate the jury to that point of view.

23 THE COURT: Well, I'm still a little concerned  
24 about the use of "tone" here because you've identified it as  
25 "meaning." So if you plug that into this term, into this

1 sentence, as who believes that the meaning of a conversation  
2 lends meaning to the substance. If you're talking about  
3 demeanor during a conversation and whether that can affect  
4 the meaning of a conversation or the interpretation of a  
5 conversation, I can understand that. But I didn't know what  
6 you meant by "tone." And also you're asking the jury to  
7 respond to that, so I was responding to it myself, and  
8 responding to it myself, I didn't really know what you meant  
9 by that. I mean if the demeanor and manner of a conversation  
10 can be taken into account in interpreting the conversation, I  
11 think that's perfectly appropriate.

12 MS. MORENO: So the Court would allow an inquiry  
13 into the area of demeanor and manner of a conversation? I'm  
14 a little puzzled by Ms. Han's response because, Judge, the  
15 audios are played; they're in Somali. I mean I don't know  
16 how the jury is going to necessarily --

17 THE COURT: Well, as I was going through the  
18 deposition transcripts -- I realize that we're going to hear  
19 the English translation, but we're also going to -- the  
20 camera's also on the deponents, right?

21 MS. MORENO: Right.

22 MR. DRATEL: Right.

23 THE COURT: So the camera's going to -- has  
24 recorded certain demeanor --

25 MS. MORENO: Yes.

1 THE COURT: -- and manner --

2 MS. MORENO: Yes.

3 THE COURT: -- of the deponents as they're  
4 testifying; I think that's perfectly appropriate. We tell --  
5 we tell jurors the same thing when they're asked to assess  
6 credibility: You can take into account the demeanor, the  
7 manner of the witness, the attitude about testifying, and  
8 things of that type.

9 MS. MORENO: Yes, your Honor, for the Rule 15  
10 conversations, but there's a plethora of other conversations  
11 where there's no camera rolling, unfortunately, for the  
12 defense, frankly. But I take your point.

13 THE COURT: So all they're going to hear is what,  
14 Somali being spoken --

15 MS. MORENO: Yes.

16 THE COURT: -- and without anything more. Well  
17 then, what can be made of the tone of a conversation or the  
18 demeanor or manner? I thought you were referring more to  
19 deposition testimony than to --

20 MS. MORENO: I was referring to both, Judge. I was  
21 referring to both.

22 THE COURT: Well, how could -- how could jurors  
23 understand the tone of a conversation that they are just  
24 hearing audio for?

25 MS. MORENO: Well, that's the government's



1 evidence. There might be some defense evidence that provides  
2 the tone to the jury; that's what I'm suggesting.

3 MS. HAN: Your Honor, again, if that is the  
4 context, that's their point of view, then again they are  
5 indoctrinating -- seeking to indoctrinate the jury to their  
6 point of view.

7 THE COURT: I don't know that -- I don't know that  
8 I would agree with that. Basically I asked the question  
9 because you're asking it of jurors so I asked it of myself,  
10 as I indicated, what does that mean to me, and I came up with  
11 a blank. And, once again, I think all you're doing here is  
12 asking jurors will you take into account evidence related to  
13 demeanor and manner whether you observe it personally or  
14 whether it comes in in any other form --

15 MS. MORENO: That's fine, your Honor.

16 THE COURT: -- and can you fairly deal with that  
17 evidence. Accept it or reject it and give it the weight you  
18 feel it's entitled to.

19 Okay. At the bottle of page 3, expert witnesses,  
20 that's out. It's -- the jury will be instructed on the  
21 credibility of experts as well as other witnesses, and it's  
22 argumentative, in any event. I don't think it's appropriate  
23 to at the first instance as experts are being discussed refer  
24 to them as hired guns, so that is out. And that's -- those  
25 are the only concerns I had about the proposed voir dire

1 submitted by the defense.

2 MS. MORENO: I think you were going to go back to  
3 the al-Qaeda issue.

4 THE COURT: I will later on. Yeah, I wanted to  
5 discuss that issue again a little bit later in a broader  
6 context. Okay. Should I be -- I assume that everyone's  
7 going to be here for the weekend, that no one's flying out,  
8 but if anyone is flying out, to come -- to return back before  
9 Monday. Let me know. I don't want to interfere with any  
10 travel plans.

11 MR. DRATEL: Just the hotel and back.

12 THE COURT: Okay. You've said goodbye to your  
13 significant others for some time, in other words.

14 MR. DRATEL: The way it is Back East, they wanted  
15 to come out here.

16 THE COURT: Okay.

17 MR. DURKIN: I'm bringing mine on Monday.

18 THE COURT: All right. Let's get to the method and  
19 manner of jury selection here just in terms of the mechanics.  
20 We'll go over this again, but this is pretty much how it will  
21 go. First of all, on the questionnaires themselves, getting  
22 back to them -- Mr. Cole, once again, I appreciate your  
23 office photocopying a sufficient number. And actually on the  
24 cover sheet it should just have the -- you know, the title of  
25 the cause and a juror identification number and nothing else,

1 just a blank line for the identification -- well, actually  
2 you can go ahead and preprint numbers 1 through 80.

3 MR. COLE: Okay. Just to make sure, we're going to  
4 bring in the morning of trial the set they're going to fill  
5 out in blank, 1 through 80 on the front, on the cover of each  
6 one; is that what you're saying?

7 THE COURT: Yeah, the first copy will be numbered  
8 "1" on the cover sheet.

9 MR. COLE: Gotcha.

10 THE COURT: Second copy number "2," third copy  
11 number "3." We're going to have a randomized list of jurors.

12 MR. COLE: Okay.

13 THE COURT: And there are going to be gaps; sooner  
14 or later, there're going to be gaps; some people will be  
15 excused, so there are going to be gaps in the -- in the  
16 stack, numerical gaps in the stack.

17 MR. COLE: That's fine. Does the cover need to  
18 have anything on it other than just number 1, number 2, juror  
19 number 1, juror number 2; anything else on the cover besides  
20 that?

21 THE COURT: Just the cause.

22 MR. COLE: Oh, U.S. versus --

23 THE COURT: U.S. versus Moalin, yeah --

24 MR. COLE: Okay.

25 THE COURT: -- that's all you need to have.

1 MR. COLE: Okay.

2 THE COURT: And you can indicate this is a  
3 confidential questionnaire.

4 MR. COLE: On the front page?

5 THE COURT: On the front page, confidential  
6 questionnaire, and you can also put they're to be used only  
7 by court personnel and others authorized by the presiding  
8 judge so that each individual has some level of comfort or  
9 security --

10 MR. COLE: Yes.

11 THE COURT: -- as they're filling out their  
12 questionnaires. And then just number them 1 through 80.  
13 Now, if you would, would you prepare perhaps another 10 or 12  
14 that are unnumbered?

15 MR. COLE: No problem.

16 THE COURT: Thank you. Single-sided, single-sided.  
17 Thank you.

18 MS. MORENO: May I ask a question, your Honor?

19 THE COURT: Okay.

20 MS. MORENO: I just have a question.

21 THE COURT: Sure.

22 MS. MORENO: So I understood that your Honor had  
23 shall we say reserved 500 jurors, potential jurors, panel  
24 members.

25 THE COURT: No, 500 --

1 MS. MORENO: Summons.

2 THE COURT: -- questionnaires and summons went out,  
3 but we're going to have -- we're going to have somewhere  
4 between -- probably between 80 and 90 individual show up,  
5 hopefully.

6 MS. MORENO: Only --

7 THE COURT: Oh, that will be -- yeah.

8 MS. MORENO: Okay.

9 THE COURT: That's a lot of people.

10 MS. MORENO: All right.

11 THE COURT: Some will never -- will never get as  
12 far as we're going in the process, and that's what I'm going  
13 to explain to you at this point. But basically we're going  
14 to have a pool -- even though 500 went out there, they were  
15 being time-qualified, and that's why we got only 85 or 90 or  
16 so back. We were time-qualifying for the length of the  
17 trial, and they're not -- they're not subject-matter  
18 qualified but they're time-qualified. So these are people  
19 who can stay with us for the anticipated length of trial.

20 MS. MORENO: I understand. Thank you.

21 THE COURT: Good enough. So basically the first  
22 day, on Monday, the 28th, the jurors are going to come over  
23 from the jury assembly room and they're going to assemble in  
24 the courtroom just below ours, Courtroom 1, which is the  
25 ceremonial courtroom. It has greater seating, and it will be

1 able to accommodate all of the prospective jurors, the jury  
2 pool. That's on the fourth floor, right underneath this  
3 courtroom. They'll be here at 9 a.m. or as shortly after 9  
4 a.m. as possible. Roll will be taken to make sure we haven't  
5 lost anybody from the jury assembly room to Courtroom 1.

6           So after that, we have the jurors seated -- and  
7 they'll be seated in no particular order, by the way; they'll  
8 just be randomly seated behind the bar or the railing, and  
9 roll will be taken. I'll come out, I'll take the bench, I'll  
10 welcome the jurors. I'm going to explain the importance of  
11 the oath. The oath has not been administered to them yet,  
12 but I'll explain the importance of the oath, and then I will  
13 tell them that after the oath is administered, I have a very  
14 important question to ask them. The oath will be  
15 administered and then I will ask them, after telling them  
16 what the brief nature -- what the nature of the case is  
17 briefly, whether they can sit as fair and impartial jurors  
18 knowing what the nature of the case involves. And it's a  
19 question of basic fairness and impartiality that will be  
20 asked more than once during jury selection as we proceed  
21 forward.

22           I would assume that there may be some individuals,  
23 given the nature of the case, who may advise that they cannot  
24 sit on the case as fair and impartial jurors, so we're  
25 immediately going to be dealing with a certain number who may

1 be excused for cause. We'll see how that goes. Let's assume  
2 that we lose a certain number of people, so we're down --  
3 let's say we've started with 90. Let's say we're down to 80  
4 or 70 at that point or some other number, and at that point  
5 I'm going to give them some traditional instructions, general  
6 instructions that might be of assistance to them if they are  
7 selected as jurors. These are general principles; they're  
8 not general questions tailored to the specifics of the case,  
9 but they relate generally to the administration of a trial,  
10 general principles, constitutional principles, and the like.  
11 I'm going to basically present these general instructions to  
12 all of the jurors who are remaining at that point. This will  
13 probably take something on the order of a half hour, maybe a  
14 little bit more, on my part.

15 I will tell them that they're going to be asked to  
16 fill out a questionnaire, emphasize how important it is that  
17 they be candid, as honest as they can be, and then we'll be  
18 passing out the questionnaires. We'll have a master index, a  
19 master list of the randomized jurors that will be correlated  
20 to obviously their names and also to their questionnaires.  
21 So the questionnaires will be passed out to the individual  
22 jurors at that point.

23 I don't think it will take the jurors too long to  
24 respond to this questionnaire. I would think that within  
25 half an hour or less, people will be responding to this

1 questionnaire. In any event, as soon as they're finished  
2 with it, they're free to go. They'll be told that they are  
3 free to go for that day and that they will be provided with a  
4 telephonic message later that evening, Monday evening, as to  
5 whether they are to report back at 9 a.m. the following day,  
6 Tuesday, the 29th, outside of Courtroom 1.

7           After all the questionnaires are gathered, Mr.  
8 Cole, we would appreciate it if your office can spring into  
9 action and make the requisite number of copies; I'm thinking  
10 six -- an original and six copies should do it, maybe seven.  
11 I'll need the original and one copy, one or two copies for  
12 the government, a couple of copies for the -- for the  
13 defense. I realize that we're dealing with a time element  
14 here, and that's why I'm trying to keep the number of copies  
15 down to a reasonable number, to say nothing of the expense;  
16 but time is primary, is the primary consideration here.

17           Do you have any idea how long it would take for --  
18 let's say you get -- well, you know, I assume there's --  
19 first of all, there's a stipulation between all counsel that  
20 the original questionnaires can be released to the government  
21 in trust for photocopying purposes; am I correct in that?

22           MR. DRATEL: Yes, your Honor.

23           MS. MORENO: So stipulated, yes.

24           THE COURT: Okay. All counsel have agreed to that.  
25 So you don't need -- you don't have to wait until you have



1 all --

2 MR. COLE: Right.

3 THE COURT: -- the copies; you can take them back  
4 in smaller groups and get the photocopying started. Do you  
5 have any idea how long you'll need to get that done?

6 MR. COLE: I think -- once we have all the  
7 questionnaires, I think we'll try to do it in an hour. We're  
8 going to have a lot of people on hand waiting, try to find  
9 all the copy machines that work, which varies from day to  
10 day, and we'll use all that I can find, and we'll just divvy  
11 it up, get them copied. And I think if we had a solid --  
12 we'll have to address it -- I think that once they're back  
13 there in our office with the staff, if we have -- certainly  
14 within two hours, your Honor, I'm confident of that, but I  
15 think within an hour, maybe an hour and a half.

16 THE COURT: Well, okay. Here's what I'm thinking.

17 MR. COLE: Just to make sure they're collated again  
18 right, stapled right, and all that.

19 THE COURT: Right. If you get these questionnaires  
20 to you in, you know, not all at once but in sequence, between  
21 generally the 11:30 to noon time period, which I think is  
22 reasonable -- it may go into the noon hour for a bit -- if  
23 you could get these returned by let's say 1:30 or as soon  
24 thereafter as possible to all counsel, to me, we could review  
25 what we have within a period of an hour and a half to two

1 hours. We're just going to be looking at this superficially  
2 just to identify those people who are out and those people we  
3 can advise telephonically when they call in you don't need to  
4 come back tomorrow, those people, it will be become pretty  
5 apparent to us, we can't have on this jury for one reason or  
6 another, and I think we'll probably have a consensus as to  
7 who should be excused.

8 MS. MORENO: And the Court -- we would do that in  
9 the courtroom in the afternoon?

10 THE COURT: Yes, yes, we would go over that. So  
11 I'm hopeful that, you know, between -- after you've had an  
12 opportunity to look at what's come back, you're going over  
13 your copies together, you're caucusing, obviously both sides  
14 are conferring, I'm looking at these myself to red-flag  
15 any --

16 MS. MORENO: Obvious.

17 THE COURT: -- people that need to be red-flagged,  
18 that by 4:30 or five o'clock we know who is deselected, who  
19 is excused for cause at that point. Then we have even a  
20 smaller group of people coming back the next day. So maybe,  
21 you know, initially we've gone from 90 to 80, and now we're  
22 down from 80 to let's say 60, just for sake of the analysis  
23 here, and at that point we have 60 coming back.

24 I'll be working with a 34 pack, what I call a 34  
25 pack, which happens to fit beautifully with the configuration

1 of Courtroom 1 downstairs because they'll be -- if you add up  
2 the number of regular jurors and alternates -- I'd like to go  
3 with 12 plus three alternates, so 15 -- plus the number of  
4 challenges each side has, you come out with 34; and all of  
5 the seats in -- well, in the jury box downstairs and in the  
6 front row on either side of the aisle in front of the railing  
7 equal 34 seats. So we're going to be working with a 34 pack.

8           At that point I'll be asking basically general  
9 questions, I'm going to do my voir dire at that point,  
10 following up on questions I think need to be followed up on  
11 the -- from the questionnaires, I'll have general questions  
12 that I'm going to direct to the 34 pack, and then -- that's a  
13 process that will take a bit of time -- each side will have  
14 approximately an hour to do their thing if they wish to take  
15 that much time.

16           As people are excused -- and it's entirely  
17 conceivable that we will excuse further individuals out of  
18 the 34 pack -- then we'll be pulling people in from behind  
19 the railing to substitute for those individuals. Ultimately  
20 we're going to wind up with our net 34 pack, at which point  
21 you'll be exercising your peremptory challenges, 7 and 12.  
22 And I use the blind strike system; you'll each have a strike  
23 sheet, you go ahead make your strikes. Mr. Dratel?

24           MR. DRATEL: Do you do it in rounds or just all --

25           THE COURT: No, blind strike.

1 MR. DRATEL: Just all of them at once?

2 THE COURT: All at once, blind strike. And we'll  
3 identify all of the jurors who have been stricken, and then  
4 we will seat the first unchallenged 12 as the jury in the  
5 case, and the next three will be our -- the next three or the  
6 last three will be our alternates, and that will be our jury.  
7 Mr. Cole?

8 MR. COLE: One question. On the phase where we get  
9 the questionnaires back, and it'll just be with counsel and  
10 the Court, the jury's excused, and we go through and look for  
11 potential cause issues, is it the case that we will have a  
12 chance -- those will probably be extreme cases -- we'll have  
13 a chance to rehabilitate people who may express a -- I'm just  
14 not sure what you meant by remove people for cause without  
15 having a chance to engage them and see if they can be fair  
16 and impartial.

17 THE COURT: I'm saying it may be obvious.

18 MR. COLE: Okay. I thought --

19 THE COURT: You know, if it's pretty obvious, you  
20 know, if it doesn't pass the smell test --

21 MR. COLE: Gotcha.

22 THE COURT: -- I don't want to spend time  
23 rehabilitating people only to see them gone. So in any  
24 event, I mean that's -- there's no percentage in that. So if  
25 somebody's, you know, responding to a question in an

1 outlandish way or in a way that clearly evinces bias one way  
2 or the other --

3 MR. COLE: Yeah.

4 THE COURT: -- I mean it can go either way --

5 MR. COLE: Yes.

6 THE COURT: -- they're gone -- and we don't have  
7 time to play games here -- they're gone, and we come down  
8 with our net group of people who haven't been, you know,  
9 flagged for obvious bias or would need substantial  
10 rehabilitation ultimately, you know, without any net gain in  
11 the process. Ms. Moreno?

12 MS. MORENO: Yes, your Honor. Thank you. After  
13 Monday when the obvious cause jurors have been stricken and  
14 the numbers have winnowed down, will we be able to know what  
15 order they will come in the next day and sit --

16 THE COURT: Keep in mind that they've -- each one  
17 has been assigned a random number, so it will be the first --  
18 it will be the first 34 who are left, who are left after the  
19 initial process of letting go some jurors who didn't even  
20 make it past the first question.

21 MS. MORENO: So you will seat them sequentially --

22 THE COURT: Yes.

23 MS. MORENO: -- by their juror number. That's what  
24 I --

25 THE COURT: Not by their badge number. You're

1 pointing to your --

2 MS. MORENO: By their juror number. I'm sorry.

3 THE COURT: Yeah. There'll be a randomized list,  
4 so you'll have -- each juror will be assigned a number, let's  
5 say 1 to 90, assuming there are 90, there will be 90 jurors  
6 initially, they'll have that number on their questionnaire,  
7 on their anonymous questionnaire, and they're also going to  
8 bear that number when they're asked to take their seats. So  
9 we'll only be calling jurors in the order in which they're on  
10 the randomized list.

11 MS. MORENO: Okay. Thank you.

12 THE COURT: So that number serves them for a couple  
13 of different purposes. Okay. Any other questions so far?  
14 We'll probably hold off -- after the exercise of peremptory  
15 challenges, obviously I'll ask if there are any  
16 constitutional challenges. That's always -- you can  
17 always -- believe me, you can always determine the question  
18 of constitutional challenges after you've seen all the  
19 strikes; that's one of the reasons I use the system that I do  
20 use rather than back and forth and back and forth.

21 So that's pretty much what we'll do the first two  
22 days. I'll probably hold off swearing the jury until the  
23 beginning of the third day, so that will be Wednesday I'll  
24 swear the jury, I'll have other administrative matters I need  
25 to cover with them from notebooks to parking, et cetera, and

1 then we'll start, we'll start with the case proper, opening  
2 statements, and then proceed from there. Mr. Dratel?

3 MR. DRATEL: Just one question, your Honor, about  
4 alternates. One at a time or all three at once? In other  
5 words, strike, strike, strike, strike, strike, strike,  
6 strike, as opposed to three and three. In other words,  
7 each -- the Court said that it was considering three  
8 alternates. In other words, we get through the 12 and 7,  
9 then we have alternates to do. Strikes are by alternate --

10 THE COURT: No, the 7 and 12 includes strikes for  
11 the alternates.

12 MR. DRATEL: Oh, it does?

13 THE COURT: Yeah. It was going to be 6 and 10,  
14 remember, and then we agreed on 7 and 12, which would include  
15 the strikes for the alternates. Do you recall that, Ms.  
16 Moreno?

17 MS. MORENO: I actually vaguely do recall that,  
18 your Honor, I do.

19 THE COURT: Would you like a transcript? And I  
20 think I was talking to Mr. Durkin about that as well; he was  
21 asking for an extra strike, and I said okay, you've got the  
22 extra strike, there would be an extra strike for the  
23 alternates, so we agreed on 7 and 12. So in answer to your  
24 question, you'll be exercising all your peremptory challenges  
25 because we're using a 34 pack.

1 MR. DRATEL: Okay.

2 THE COURT: And, once again, the first 12 -- the

3 first 12 who are unchallenged are the jurors; the next three

4 unchallenged are the three alternates and in that order.

5 Okay? Can we move to another subject then if we're done with

6 the jury selection? I just wanted you to have a general idea

7 of what we were going to be doing. The protective order, the

8 proposed protective order, apparently that's the subject of a

9 difference of opinion here.

10 MS. MORENO: Excuse me, your Honor. I'm so sorry.

11 On the revisions to the questionnaire that your Honor has

12 ruled upon, did you -- is there a decision on who does that?

13 I'm happy to do that and then send it to the government.

14 THE COURT: Either way. Can you work that out?

15 MS. MORENO: Yes.

16 MS. HAN: Yes, your Honor.

17 MS. MORENO: And with respect to the proposed voir

18 dire questions that I submitted that the Court has now also

19 revised, would you like me to submit a new amended one?

20 THE COURT: Not necessary.

21 MS. MORENO: I can just use it as a guide?

22 THE COURT: Yeah. I just -- all it did, Ms.

23 Moreno, was alert me to certain issues that we needed to

24 discuss. You don't need to in any way modify that at this

25 point or update it. Okay. Then I received a proposed order;



1 this relates to the linguist. Okay. I think the term -- are  
2 you with me, everyone?

3 MR. DRATEL: Yes.

4 THE COURT: Okay. I think the term "linking" was  
5 of concern to the government. In the government's proposed  
6 order regarding the linguist, it's set forth: It is further  
7 ordered that defense counsel may use the witness's true name  
8 for investigation of his background and qualifications but  
9 without linking his true name with, one, his status as an FBI  
10 employee; two, his status as a government witness in this or  
11 any other matter; or three, the pseudonym he uses. Do you  
12 wish to be heard on this?

13 MR. WARD: Your Honor, I don't have much to add. I  
14 think we're fairly close to a solution to this. The reason  
15 we used the term "linking" is the objective of this is not to  
16 impair anybody's ability to cross-examine the witness, but to  
17 protect him by not going out and trying to prepare for  
18 cross-examination by saying oh, by the way, this guy, he's  
19 going to be -- he's the government's expert linguist and he's  
20 testified in other government trials. So if you want to go  
21 out and talk to other linguists about his skills as an  
22 interpreter or their experience with him, that's fine, so --

23 THE COURT: You don't want his cover blown  
24 basically; is that it? You don't want his position linked  
25 with his name as a linguist as they're doing their

1 investigation.

2 MR. WARD: As they're doing their investigation.

3 THE COURT: I thought "linking" was a little  
4 unclear myself. How about just using the term "disclosing"  
5 or "affirmatively disclosing"?

6 MR. WARD: That's fine, your Honor.

7 THE COURT: Is that acceptable?

8 MR. WARD: That is acceptable to me.

9 THE COURT: Doesn't that serve the same purpose?

10 MS. FONTIER: It does, your Honor.

11 THE COURT: I didn't know whether you were talking  
12 about doing an Internet search such that the search that you  
13 have conducted would automatically create a link in that  
14 sense between the individual and his occupation as an FBI  
15 employee; I thought maybe that's what you were referring to.  
16 So just go ahead and do your investigation, but don't  
17 affirmatively disclose the name and association with the --  
18 with his job as I understand it. Is that acceptable?

19 MR. WARD: Thank you, your Honor. That's exactly  
20 what we're looking for. I'll resubmit an order --

21 THE COURT: Okay.

22 MR. WARD: -- reflecting that.

23 MS. MORENO: That's acceptable, your Honor.

24 THE COURT: Just use -- yeah, you can substitute  
25 "disclosing" or "affirmatively disclosing" for the term

1 "linking," okay?

2 MR. WARD: Yes, your Honor.

3 THE COURT: Okay. Thank you, Mr. Ward.

4 MR. WARD: Thank you.

5 THE COURT: Okay. Then we have the 17 (c) issue,  
6 the order or issuance of Rule 17 (c) subpoenas. This came in  
7 not under seal I assume -- well, it did come in under seal.  
8 May we discuss this openly?

9 MR. GHAPPOUR: Yes, your Honor.

10 THE COURT: Okay. Well, so some of the articles  
11 referred to by Mr. Bryden in connection with his background  
12 or that have been of assistance to him in forming opinions  
13 are not available, you can't find them; is that what it is,  
14 Mr. Ghappour?

15 MR. GHAPPOUR: There are 72 of his listed  
16 publications that he authored -- I'm sorry -- 57 of his  
17 listed publications that he authored that --

18 THE COURT: Yeah, that --

19 MR. GHAPPOUR: -- were not available on the 12  
20 major academic search engines that we ran through in addition  
21 to my law school librarian, who, after a day and a half of  
22 searching through all of his databases, said that he doesn't  
23 believe they're publications, so --

24 THE COURT: Okay. But I want to make -- I want to  
25 make clear that these are his own articles, these are his own

1 publications, not third-party publications.

2 MR. GHAPPOUR: No, your Honor.

3 THE COURT: So you made a request of the government  
4 or --

5 MR. GHAPPOUR: I made a request -- I can get you  
6 the exact date; I think it's listed in the --

7 THE COURT: Okay.

8 MR. GHAPPOUR: I believe the government had contact  
9 with Mr. Bryden and he said -- they just got back to me last  
10 week -- and he said that he checked his computer, I think his  
11 computer hard drive had crashed and therefore he was unable  
12 to search his computer and he didn't know where else to find  
13 these publications.

14 THE COURT: So you didn't have --

15 MR. GHAPPOUR: And he couldn't find them on Google  
16 either.

17 THE COURT: Okay. And no hard copies that you were  
18 advised of?

19 MR. GHAPPOUR: I'm -- not to my knowledge.

20 THE COURT: Okay. Mr. Ward, Ms. Han, Mr. Cole?

21 MS. HAN: Your Honor, I don't have the exact number  
22 of articles that were listed on the CV that we provided to  
23 defense counsel; I assume Mr. Ghappour can tell me. But I  
24 believe that we provided approximately half of the articles,  
25 and those are the articles in which we are in possession. He

1 is correct, I did reach out to Mr. Bryden. Mr. Bryden  
2 explained that he lost essentially -- he had a -- his hard  
3 drive crashed, so all of the electronic versions of his  
4 article that he had he no longer possesses. He did attempt  
5 to find other articles, and he told me as of Monday that he  
6 was not able to do so. He told me that would himself  
7 continue to try to do that, and whenever he found an  
8 additional one, he would provide one to me; he has not  
9 provided any additional ones to me.

10 THE COURT: Okay. So is he trying to get this  
11 computer problem solved? I imagine that's something that's  
12 going to be quite a setback for him in the future.

13 MS. HAN: Your Honor, what I understand is that the  
14 hard drive crashed -- I don't believe it was that recently.  
15 I don't exactly know when that was, but that was an issue  
16 that occurred, and as a result he lost all of these  
17 documents.

18 THE COURT: So that work product is gone forever, a  
19 forensic can't even pull it out?

20 MS. HAN: Your Honor, I don't know the extent to  
21 which Mr. Bryden has gone to try to recover his hard drive; I  
22 just know that -- what he informed me is that electronically  
23 this hard drive, he's not able to access anything that was on  
24 that before and that -- I guess in terms of a backup, I don't  
25 believe that he had any backup, he just had additional

1 electronic versions of these articles that Mr. Ghappour asked  
2 for.

3 THE COURT: Have you asked him to continue  
4 reasonable diligence in efforts to obtain these missing  
5 articles?

6 MS. HAN: Of course, your Honor, yes.

7 THE COURT: Would you do that?

8 MS. HAN: Yes, your Honor, we did; we did it a week  
9 ago and we did it on Monday of this week as well.

10 THE COURT: Okay.

11 MR. GHAPPOUR: Your Honor, in light of recent  
12 revelations, I would like to either make another application  
13 for the hard drive or, alternatively, extend the current  
14 application to include Mr. Bryden's hard drive so that --

15 THE REPORTER: Excuse me. I didn't hear the end of  
16 that.

17 THE COURT: Yes, you're soft-spoken, Mr. Ghappour.

18 MR. GHAPPOUR: I'll come and use the --

19 THE COURT: You're -- feel free, any of you, to use  
20 the microphone; I know it will be helpful to Ms. Henson.

21 MR. GHAPPOUR: Your Honor, the point is this is why  
22 we need a subpoena, and I would submit that we can either  
23 apply -- submit a separate application for Mr. Bryden's hard  
24 drive or, in the alternative, extend the current one to  
25 include the hard drive so that we can conduct a forensic

1 analysis and recover the publications, the 57 publications,  
2 over half of the publications provided on his CV.

3 THE COURT: Ms. Han?

4 MS. HAN: Your Honor, I'm not exactly sure to what  
5 end. It is one thing -- so I actually reached out to  
6 Mr. Ghappour and asked him if there were specific articles on  
7 the CV that he liked that we did not have or that we had not  
8 already provided to him because certainly the articles that  
9 are provided and are listed on the CV, not all of them are  
10 related to the testimony that Mr. Bryden is going to provide  
11 here in court, so I'm not exactly sure to what end every  
12 single article that Mr. Bryden listed on his CV, what benefit  
13 that would be to the defendants.

14 THE COURT: Well, has Mr. Bryden identified any  
15 articles that -- that he is no longer in possession of or  
16 can't retrieve as material for him in reaching any of the  
17 opinions or the testimony he'll give in this case?

18 MS. HAN: No, your Honor. And, your Honor, in  
19 terms of the opinions, they are his -- actually they are his  
20 own writings. They're not writings that he's relying upon;  
21 they are his own writings.

22 THE COURT: Understood. Thank you for the  
23 clarification, but I still have the question. I mean are  
24 these writings essential for his testimony in this case? Is  
25 his testimony based on these writings?

1 MS. HAN: No, your Honor.

2 THE COURT: Would he have any objection to -- I  
3 don't know if you discussed this with him -- would he have  
4 any objection to seeing if any of these things could be  
5 retrieved by a forensic that might be available to the  
6 government?

7 MS. HAN: Your Honor, I do not know the answer to  
8 that.

9 THE COURT: I'm sorry?

10 MS. HAN: I do not know the answer to that.

11 THE COURT: Could you --

12 MS. HAN: I don't know whether or not he's still in  
13 possession of the hard drive, I don't know where the hard  
14 drive is; I don't have any of that information.

15 THE COURT: Okay. Well, why don't you continue on  
16 with your conversation with Mr. Bryden about possible  
17 approaches to retrieve any of this. Tell him that obviously  
18 the Court is concerned. If there are ways -- if there is a  
19 way that the missing articles can be retrieved without undue  
20 time or expense, including forensic that might be available  
21 to the government for that purpose, then perhaps that should  
22 be utilized as well. I think under the -- you know, I could  
23 sign off on something like this, but I think it might be  
24 useless. If you want to -- I would encourage the two sides  
25 to continue discussing this, and it may be that you can reach



1 some kind of an agreement here and, if not, rework an  
2 application or a request for an order, Mr. Ghappour.

3 MR. GHAPPOUR: Well, just a couple points. The  
4 first is I would submit they're all relevant, and I question  
5 how Ms. Han can make the statement that they're not relevant  
6 without actually having read the documents.

7 Second, we've -- I believe my first communication  
8 to the government about this matter was back in October,  
9 might have been November. Now that we're on the eve of trial  
10 and that the government has asserted that their trial is  
11 based on calls and expert testimony and nothing else, I would  
12 say that Mr. Bryden's testimony is of paramount importance  
13 and specifically the cross on that testimony; and in order do  
14 an effective cross, we need his prior statements and prior  
15 publications, and we need to determine if the publications  
16 are his, and at this point, without a forensic analysis of  
17 his hard drive, I can't even tell if they're even on this, I  
18 can't even tell if these are made-up publications, to be  
19 honest.

20 THE COURT: Okay. Well, once again, I encourage  
21 you to -- I encourage the government to do what they can  
22 along the lines that have been suggested and to keep the  
23 defense advised of any progress here, letting Mr. Bryden know  
24 that this is something that should be done and all reasonable  
25 efforts to retrieve additional material from the hard drive

1 should be undertaken at this point in concert with the  
2 government.

3 MS. HAN: Yes, your Honor.

4 THE COURT: Very good. Okay. Very good. So I'll  
5 put the matter of the 17 (c) subpoena aside for the moment at  
6 this time. Okay. Next thing I wanted to cover was status of  
7 the wiretap transcripts. How are we doing there?

8 MR. COLE: Yes, if I can address that, your Honor.

9 THE COURT: Sure.

10 MR. COLE: The Court -- if the government recalls  
11 correctly, the Court had set a deadline for January 18 for  
12 the defense to provide us with their transcripts, either  
13 transcripts of calls they wanted to use that we weren't using  
14 or their disputes with our transcripts. And we have  
15 continued to receive transcripts throughout the week; we  
16 received six I think last night. And the government would  
17 like, first of all, a firm deadline that we're done, that  
18 there's no more transcripts coming from the defense. They're  
19 a week past the Court's deadline after the last hearing, and  
20 we'd like to at least know that as of last night, we're --  
21 we've received our transcripts; that's one request the  
22 government has.

23 Secondly, the -- there's been -- I know there's  
24 been talk in trial memos and prior hearings about the rule of  
25 completeness. The United States -- we are receiving

1 transcripts on a rolling basis from the defense so late that  
2 the United States -- and we have not received any specific  
3 delineation of what they would want played as part of the  
4 rule of completeness, and so we would request that -- I know  
5 the determinations of whether or not something will be played  
6 under the rule of completeness will be made later on by the  
7 Court, so we're not asking for any ruling about that now  
8 obviously, but what we would request is if the defense  
9 believes and convinces the Court that some other part of an  
10 audio call should be played or that a different call  
11 altogether should be played, that that happen in their case  
12 because we do not have the ability or time, having received  
13 no delineation of that and only receiving transcripts up to  
14 last night, to even determine yet if we agree with their  
15 transcripts. And so that's our request simply with respect  
16 to the rule of completeness, but as the Court decides what  
17 ought to come in, if anything, that those things come in in  
18 their case.

19           And so those are our two only points about the  
20 transcripts. Everything else seems to be moving forward. We  
21 have been successful in resolving some of the issues with the  
22 transcripts. There have been various discrepancies pointed  
23 out by the defense. Last time you might recall there was  
24 discussion about the word "infidel" versus the word  
25 "non-Muslim." We resolved that; we just decided to go with

1 what the defense wanted and made all those changes. So a  
2 lot's been resolved. Frankly, I don't think there's really  
3 that much material difference in the transcripts anymore, but  
4 there will be still some lingering disputes over them.  
5 It's -- I think that both sides know what those are, and  
6 we'll just proceed in the ordinary course from this point.  
7 If there's any other questions the Court has in that  
8 regard --

9 THE COURT: Well, no. I'm concerned about the late  
10 submission by the defense of audio transcripts, if that be  
11 the case. I would have certainly wanted this to be resolved  
12 so that issues, specific issues, could be addressed if there  
13 are any. Ms. Fontier?

14 MS. FONTIER: Your Honor, I don't make any -- I'm  
15 not pretending that we have, you know, given things over  
16 early, certainly. We are doing this as quickly as we -- I  
17 actually withdraw that -- our interpreter is doing this as  
18 quickly as he humanly can. Your Honor will recall that we  
19 had an extreme amount of difficulty even finding someone who  
20 did not have a conflict. This whole process started, you  
21 know, late in the game as to getting our transcripts together  
22 and figuring out exactly what it is that we want. We had  
23 our -- we were reviewing different transcripts that the  
24 government had provided. I think it's worth pointing out,  
25 your Honor, that the latest version of the government's

1 transcripts that we were told they were the calls and the  
2 portions of the calls that they were going to play in their  
3 case-in-chief was handed to us on January 10. This wasn't --  
4 it's not like this was an extremely long time ago. It's a  
5 different version. Some of the calls have some material  
6 differences in them. We had to go through and check all of  
7 those, have our interpreter go back and listen to calls for a  
8 second, third, fourth time and look at the transcript that he  
9 had done and check whether it was correct starting on  
10 January 10. And then we also had to go through with this new  
11 version that they gave us on the 10th, compare it to the old  
12 version, see if there was differences and whether we needed  
13 to have a complete transcript done. And then also from that  
14 there were also at least one call that was not previously  
15 noted in other -- in their prior submissions that they were  
16 going to play, so then we had to go back and see if there  
17 were any additional calls.

18           So while this is happening late in the game, we  
19 are -- every time we can get a new version of transcripts  
20 from the government, we have to start over, and so we started  
21 this process over on January 10. And giving one interpreter  
22 eight days to go through 80 calls --

23           THE COURT: Well, I understand that --

24           MS. FONTIER: -- to see whether or not these are --

25           THE COURT: Hold on, hold on, Ms. Fontier, please.

1 I was under the impression that there were just a few  
2 remaining transcripts that you were getting into January. I  
3 thought that what the government perceives as pertinent was  
4 given a long time ago. Am I incorrect in that?

5 MS. FONTIER: It keeps -- we started at about 180  
6 calls I think, it went to 120, at some point they whittled  
7 that down to 100, I think there's about 80 now. But the  
8 problem is, your Honor, there's no indication of what they've  
9 changed, what has been taken out, and there are some where  
10 the translations were actually changed. I think we've worked  
11 some of that out, but we have to -- every time we get a new  
12 set, there's no indication of how it's different from the  
13 previous one --

14 THE COURT: You mean --

15 MS. FONTIER: -- so it's a matter of going --

16 THE COURT: Ms. Fontier, please. The court  
17 reporter can't take down two people speaking at the same  
18 time, so I'll try to give you the courtesy of finishing, but  
19 I need to ask some questions here --

20 MS. FONTIER: Yes, your Honor.

21 THE COURT: -- just to see where we are in terms of  
22 teeing this thing up. I mean you can consider that we're in  
23 trial right now, and I'm still hearing that there's  
24 unfinished business with respect to transcripts, and that's  
25 very disconcerting because we're not going to break down this

1 trial, we're not going to use jury time for going over  
2 evidentiary issues or taking care of matters should have been  
3 taken care of a long time ago; everybody's got to understand  
4 that.

5           So rather than the recriminations or finger  
6 pointing, I just want to be sure that we're going to be ready  
7 to go with all of the transcripts in final form. I  
8 understand that there may be a few differences here and there  
9 that need to be ironed out, as counsel's referred to it, but  
10 we're far beyond the point where these things should be  
11 exchanged. And if there are audio transcripts of other  
12 snippets of calls or intercepts that the defense already has,  
13 or if there are audio transcripts of new calls not previously  
14 identified by the government, they've got to go over  
15 immediately, absolutely immediately, so that everybody's on  
16 board as to what's going to be proffered and whatever issues  
17 relating to differences in transcription or translation can  
18 be undertaken and finished.

19           MS. FONTIER: Your Honor, I just want to say that  
20 we're not sitting on transcripts. We have turned over what  
21 we have. We have provided additional -- I think what I'm  
22 trying to say is that we're not done, and I don't -- I would  
23 love it if we were, but we're not. We have provided -- based  
24 on the calls that the transcripts, the final transcripts that  
25 we received on the 10th, we've provided additional calls and

1 asked for complete transcripts of calls that were further  
2 winnowed -- sorry -- further whittled down from the  
3 government from our interpreter. We haven't received all of  
4 the transcripts yet.

5 I wish I had a different answer, but I don't.  
6 We're providing everything as quickly as our interpreter can  
7 produce it. I think what I was concerned about is that if  
8 the Court set a -- say if they're not turned over tomorrow,  
9 you can't use them, that would be something that I would be  
10 very -- I would have a very severe objection to and hope that  
11 we would be able to work out because it's one man who's a  
12 certified interpreter that has to do the lion's share of  
13 work.

14 THE COURT: Well, I understand your limitations;  
15 you've indicated what the limitations have been with respect  
16 to your interpreter. But what we cannot have would be  
17 transcripts going over at the last minute without the  
18 government really having an adequate opportunity to go over  
19 what the transcript is so they can take -- they can do their  
20 due diligence and confirming whether it's a proper  
21 translation and then identifying any issues and/or requests  
22 to bar any particular part of it, of a transcript.

23 As I say, I'm not -- I'm not going to create down  
24 time for the jury for those purposes. And keep in mind the  
25 Court has to be able to go over these issues as well and



1 hopefully come up with reasoned rulings. So if it means  
2 redoubling the effort at one level or another, then it needs  
3 to be done. I haven't said that any of this is barred, but  
4 are there circumstances under which conceivably some of this  
5 could be barred? Yes, I can envision some circumstances. I  
6 certainly wouldn't want to see the case get to that point, I  
7 wouldn't want to see the case having to be mistried because  
8 one side or the other wasn't ready to proceed with all of the  
9 evidence lined up; that would be terrible, especially given  
10 what the Court has already gone through -- and the parties as  
11 well -- in terms of preparing this case for trial. So I'd  
12 urge -- I urge the defense to do whatever it needs to do to  
13 get this thing ready to go, get these materials exchanged and  
14 in proper form. Ms. Moreno?

15 MS. MORENO: Thank you, your Honor. In fairness,  
16 so that the Court knows, on behalf of Mr. Mohamud, I have  
17 produced what I believe to be one of six conversations of  
18 transcripts to the government and asked them if their  
19 linguist could go over the full translation to see if there  
20 are any problems or differences so that perhaps we can  
21 resolve them. I produced I think somewhere between six and  
22 eight conversations that would fall under that category, and  
23 I've heard nothing back from the government on that, so that  
24 the Court understands the full picture of --

25 THE COURT: When did you produce those, all at

1 once?

2 MS. MORENO: No, no, it's a rolling production.

3 THE COURT: From when to when?

4 MS. MORENO: I want to say the last -- the first  
5 two or three calls probably a few weeks ago, the last call I  
6 produced was maybe a few days ago. So it's been -- it's been  
7 a period of time. But each time I did give them the full  
8 transcript, I asked if there are any problems, please let me  
9 know, and I haven't heard.

10 MR. COLE: And we will be getting back to all of  
11 them with their -- on our comments about their transcripts,  
12 but in some -- and I don't want to lump them all in one --  
13 one brush because they're all submitted separately and some  
14 submitted -- Mr. Durkin submitted his earlier. And so we're  
15 dealing with them as they come in. We will be getting back  
16 to all of them about their issues, if we have them, with  
17 their transcripts, and so they will be hearing back from us  
18 on that. But we don't know -- unless they mean by Rule 106  
19 we want them to play the whole -- all these calls in total,  
20 if that's what they meant, that's as far as we've gotten in  
21 any identification of what portions of a call they believe  
22 are necessary. They've just given us a list of calls, and  
23 entire calls. And so all I'm saying is I think the Rule 106  
24 issue is easier -- obviously the Court needs to see what's  
25 going on later in trial to rule on it anyways, but we're not

1 going to be in a position to -- they just need to play those  
2 in their case if it's admitted because we're not going to be  
3 in any position to be able to do that for them without being  
4 able to vouch for their transcript or agree to their  
5 transcript much less have it ready to play for them is all  
6 I'm pointing out.

7 THE COURT: Well, in the event there's a  
8 disagreement as to a transcript, I mean, you know, the  
9 translation I assume --

10 MR. COLE: Sure.

11 THE COURT: -- that your -- Mr. Dratel, you're  
12 saying that's not going to happen?

13 MR. DRATEL: No, no, what I'm saying is that's a  
14 separate issue. I agree that the -- competing transcripts is  
15 different than 106. I think it would be -- I think it would  
16 be unfair to -- unless a particular defendant wanted to, I  
17 think it would be unfair to defer completion until the  
18 defense case for this reason: If the purpose of the rule is  
19 for fairness and not to mislead the jury about context, I  
20 don't want to mislead them for a two-week period and then all  
21 of a sudden be telling them remember that conversation you  
22 heard two weeks ago, here's the rest of it; I don't think  
23 that's fair.

24 I think that -- and I'm also -- it's also possible  
25 just to read a transcript, if the transcript is agreed upon,

1 to do the completeness rather than play a particular part of  
2 a call if the government feels that, you know, the technology  
3 -- the technological part of it is too daunting. And I'm  
4 not, you know, making that decision for them; that's their  
5 decision because it's their evidence. But in terms of -- and  
6 that's the way I've done it in other cases is that it doesn't  
7 necessarily require a foreign language call to be played at  
8 the same time; rather, if a transcript is agreed upon, it can  
9 be read to complete the particular conversation or the  
10 portion that's being sought to be introduced under 106.

11 THE COURT: Did you want to respond to that?

12 MR. COLE: Well -- well, certainly that is a lot  
13 more potentially doable than anything else, so then the jury  
14 will not be hearing audio that goes with the transcript as  
15 they will with all the parts we're playing. But that said, I  
16 do know that under the case law, the Court has discretion to  
17 order -- or to order to prove, and even in the context of 106  
18 can -- it's well within the Court's discretion to let it  
19 happen in the defense's case, to have it be played in context  
20 contemporaneously with the clip we played in the defense's  
21 case.

22 THE COURT: Well, that -- probably that would be  
23 the most -- that would be the preferable way to do it. But  
24 other than saying look, you need to work, you need to confer,  
25 you need to communicate where you are, what can be provided

1 to you now, what remains, what the best estimate is for  
2 what's remaining, making any agreements you can make,  
3 entering into stipulations you can enter into so this comes  
4 in, as I say, as seamlessly as it can. Mr. Durkin?

5 MR. DURKIN: Judge, if we're done with this, I have  
6 a related issue to this. I think the government and I are  
7 in -- I've got my tapes to them. I don't think I have an  
8 issue with that, but I have a separate issue that is related,  
9 and this may be because of a misunderstanding on my part, but  
10 we received these calls in -- we had audio waves, but then we  
11 got summaries or verbatims. And the summaries are just two,  
12 three, four paragraphs, identified the speaker, someone from  
13 the government summarized them, and we have those, and  
14 there's a much larger number of those, and --

15 THE COURT: Are these line sheets you're talking  
16 about, Mr. Cole?

17 MR. COLE: Yes. I mean that's -- they're not line  
18 sheets but they're similar in terms of just summaries.

19 THE COURT: Okay.

20 MR. DURKIN: Here's the problem. The line  
21 sheets -- these aren't line sheets, and I was under the  
22 impression that they were the equivalent of line sheets, and  
23 therefore I thought we were getting identified pursuant to  
24 Rule 16 any statements of our client, and we identified I  
25 think 16 calls of our client from either the summaries or the

1     verbatim.

2             Recently I asked Mr. Cole if that was correct, that  
3     those were all the calls in the government's possession that  
4     my client was a speaker in, and he told me they have no way  
5     of knowing that. And I guess it is what it is, but in terms  
6     of something being barred, I guess I'd like to reserve my  
7     right. If there's some other call out there in the universe  
8     that we come across in the course of the trial -- I mean if  
9     somebody starts talking -- and I think I have a pretty good  
10    handle on what's out there, but if somebody starts talking  
11    about a time period involving perhaps other people and I go  
12    back and have somebody listen to some other tapes and find  
13    one for my client, I don't want to be barred from trying to  
14    use that at some point. I just don't have any other way of  
15    knowing how to do it. It would be an insurmountable task to  
16    have someone -- I would have had to hire an interpreter to  
17    listen to the calls.

18            THE COURT: Okay. Thank you. You'll reserve  
19    whatever you need to reserve I think is what you're saying.  
20    I mean your concern is that you're surprised by something, a  
21    new call identifying your client --

22            MR. DURKIN: You understand my point? Have I made  
23    myself clear in terms of the dilemma we're in? We can't --  
24    there's no way we could possibly go through every one of  
25    these foreign language calls to try to determine whether our

1 client's on it. Like in an organized crime case, when you  
2 have the line sheets, you go through the line sheets and  
3 generally get a pretty good idea of who the speaker is, and  
4 that's how you find out which calls you want to look at. So  
5 I mistakenly thought the summaries were the equivalent of the  
6 line sheets in terms of what we would have. And, frankly, I  
7 don't know how the government gets around Rule 16 by saying  
8 we may have a whole slew of audio calls out there in which  
9 your client's voice is recorded, we just don't know whether  
10 it is or not.

11 MR. COLE: Well, I -- I'm sorry to interrupt. I'm  
12 sorry.

13 THE COURT: Go ahead, Mr. Cole.

14 MR. COLE: I don't think that's fair. We complied  
15 with Rule 16. We gave the audio recordings, and we didn't  
16 hold back our summaries to the extent we had one. If we had  
17 a summary of a call, we turned it over. What Mr. Durkin is  
18 saying is that -- is that if we turned over the audio that  
19 may contain his client's calls -- turned over the audio  
20 itself -- that we have an additional obligation to turn over  
21 some summary that doesn't exist or prepare one for him.  
22 That's not Rule 16. And these -- this case has been pending  
23 now for a very long time presumably because the defense --  
24 and then all the status conferences -- because they needed to  
25 review the audio, and the defendants themselves can listen to

1 their own audio calls.

2 THE COURT: I understand. I don't see any Rule 16  
3 violation in light of what you've disclosed. But I think  
4 what Mr. Durkin's concerned about is all of a sudden what  
5 happens if a call comes up that wasn't identified in any line  
6 sheets because there are no line sheets, he didn't see him in  
7 any summaries, and all of a sudden somehow it comes to his  
8 attention and it's not helpful.

9 MR. DURKIN: That's all I'm saying.

10 THE COURT: Yeah, that's all he's saying. He wants  
11 to reserve his right to keep -- to keep that out.

12 MR. COLE: We're not bringing in -- we're not  
13 bringing in a call like that, but if what he wants is to --

14 THE COURT: I know. You've identified what's  
15 pertinent, you did that very early on, and I know that the  
16 pertinent calls have been reduced in number, and I understand  
17 what Mr. Durkin's point is. I don't see that as a realistic  
18 likelihood in this case, but if it happens, we'll address --

19 MR. DURKIN: I'd also like to reserve my right to  
20 try to offer it if need be. I don't think this is going to  
21 happen --

22 THE COURT: Okay.

23 MR. DURKIN: -- but I just want to make --

24 THE COURT: And that's why I say you reserve your  
25 rights. If it's unhelpful, if it's harmful, then you'd



1 obviously be preserving your right to have it barred; if it's  
2 helpful, you'd want to use it --

3 MR. DURKIN: That's right.

4 THE COURT: -- and you'd be making a pitch of late  
5 discovery and that you ought to be able to utilize it. I  
6 understand that.

7 MR. DURKIN: Right.

8 THE COURT: Okay. All right. Okay. I think I've  
9 said enough in terms of the transcripts here of the  
10 intercepts.

11 MR. COLE: Can I mention --

12 THE COURT: And the only thing else I want to say  
13 is if you feel that you need some assistance of the Court,  
14 you're at an impasse right now, you just need something to  
15 push yourselves across the line, let me know, and I'll get  
16 Judge Gallo to assist you on it. I don't think that's  
17 necessary, but let me know if you need that kind of  
18 assistance. And if he can meet with you off hours at some  
19 point, I'd sure he'd be happy to do so.

20 MR. COLE: And just so you know, your Honor --  
21 defense I'm sure will correct me if they see it differently  
22 -- I think that to the extent we know what we're dealing  
23 with, to the extent we have a transcript, okay, that we've  
24 received so far, what we are seeing is a very few number of  
25 discrepancies that are really material. There are two

1 versions of transcripts because their interpreter would  
2 interpret something and we would interpret something, and  
3 anytime two people interpret something, the words they use  
4 might be slightly different although the meaning is  
5 usually -- usually not very different except in limited  
6 cases, and those are what we all focus on; they focus on it  
7 with us, we focus on that with them. And I suspect that most  
8 of the transcripts -- you know, we have a number of  
9 transcripts, let's say 80, that's ballpark, they've given us  
10 I think about 26 so far, this is much -- and to some extent,  
11 this is much ado about not that much because I think the  
12 actual disputes are not as many as it seems like, although  
13 our wording is sometimes slightly different.

14 THE COURT: Okay. Ms. Moreno is certainly agreeing  
15 with you. I'll take that as a positive sign here. Times  
16 like this, we look for positive signs.

17 MR. COLE: The only other transcript-related issue  
18 I wanted to raise -- and I have not had the chance to discuss  
19 it with the defense, and I'm not asking for any ruling on it  
20 today by any means, but I wanted to highlight it -- and that  
21 is this issue of transcripts in the jury. We believe, your  
22 Honor, that it will be important -- and again, I'm not asking  
23 the Court to rule on this -- but the jury -- I don't know how  
24 the jury can deliberate in this case or do its job in this  
25 case without having the transcripts during its deliberation.

1 And if there's a disputed transcript, we're fine with the  
2 defense's transcripts going back too; we're not trying to  
3 seek to exclude the defense's transcripts if there's two  
4 versions of a transcript. But we will be back in the  
5 courtroom a hundred times either if there's being playbacks  
6 requested -- they're going to have to have the transcripts.  
7 I just don't know how it will be possible otherwise. And we  
8 just wanted to highlight that for the Court as something that  
9 we'll be asking for later in the trial, and we think that the  
10 Court certainly has the ability to do it, especially if both  
11 sides' transcripts, to the extent there is a dispute, both go  
12 back.

13 THE COURT: Well, we've already touched upon this,  
14 as you know; we did so a while back. And I think certainly  
15 it's within the Court's discretion to allow the transcripts  
16 to go back, and we'll -- if it becomes an issue --  
17 apparently -- well, it will be a request in any event, and  
18 I'll certainly deal with it at the appropriate time. Okay.

19 MR. DRATEL: Your Honor, on that issue, may I just  
20 ask what the Court's practice is with respect to the  
21 deliberations? Some courts wait for the jury to ask for even  
22 any exhibits --

23 THE COURT: Yeah, we're getting way ahead of  
24 ourselves on this.

25 MR. DRATEL: Okay.

1           THE COURT: I just don't want to take up any more  
2 time on it. I've got a list of things I really need to cover  
3 now, we're running short on time, and I know we won't even be  
4 able to finish what I've got scheduled for today. So if you  
5 can defer on some of these --

6           MR. DRATEL: If that's the case, your Honor, can I  
7 go back to the jury number -- because it is important -- in  
8 the sense of looking at Rule 24, Federal Rules of Criminal  
9 Procedure, 24 (c), alternate jurors --

10          THE COURT: One challenge for every two jurors,  
11 alternates.

12          MR. DRATEL: Right, or for three or four jurors,  
13 three or four for two challenges. But essentially we're not  
14 getting any extra peremptories at the main body is what we're  
15 getting because at 12 and 7 we're just getting 10 plus 2  
16 really is what we're getting; we're not really getting any  
17 extra. I thought we were getting extra to the panel; we're  
18 just getting now what we're statutorily entitled to.

19          THE COURT: What do you mean extra for the panel?

20          MR. DRATEL: In other words, when Mr. Durkin asked  
21 for extra --

22          THE COURT: Oh, I see, aside from the alternates.

23          MR. DRATEL: From the 12, yeah, from the main  
24 panel. That's what I thought we were getting. I guess I  
25 misunderstood that.

1 THE COURT: I wouldn't even be going with three  
2 alternates except we're coming through flu season right now,  
3 and, you know, the length of the case is a little problematic  
4 at this point. The latest submission from the government is  
5 six to seven days, excluding jury selection, which basically  
6 takes us through the second week; it completes the second  
7 week. Any reasonable estimate? I'm not asking you to commit  
8 to anything, but what's your feeling here?

9 MR. DRATEL: I think we will probably -- we can do  
10 our case within a full week, in other words, you know, a  
11 five-day week, I think we'll be done. I don't know if  
12 that -- oh, and the Court -- I think it's a holiday, I think  
13 it's Monday, the 18th; is that correct? That's Presidents  
14 Day. Okay. So, you know, we might finish that week if, you  
15 know, if you go through the 14th with the government's case,  
16 starting on the 19th, those four days. You know, we'll give  
17 it a shot. We don't like to --

18 MR. COLE: We hope to be done by the 8th hopefully.  
19 Our case should be done that -- the week before.

20 MR. DRATEL: Oh, I'm sorry, sorry. Oh, that's  
21 right, seven days. All right. Then we'd definitely be done  
22 by the end of that week or the end of the week of the 19th  
23 depending on when the government finishes precisely.

24 THE COURT: Well, if you're done by the 8th,  
25 Friday, the 8th, then what you're saying is you'd be done by

1 the 15th --

2 MR. DRATEL: Yeah.

3 THE COURT: -- by the next week.

4 MR. DRATEL: Right. So the Court's saying the 15th  
5 is a calendar day.

6 THE COURT: It is a calendar day --

7 MR. DRATEL: So, you know, maybe that week, maybe  
8 the beginning of the following week. But --

9 THE COURT: I know what the rule says --

10 MR. DRATEL: Okay.

11 THE COURT: -- and that's a correct reading of it.

12 MR. DRATEL: So I don't know if the Court can make  
13 adjustment with maybe one additional challenge in that  
14 regard. That's what we'd be asking for, your Honor. Thank  
15 you.

16 THE COURT: Okay. So we'll go with 8 and 13, and  
17 we'll work with a 36 pack.

18 MS. MORENO: Thank you.

19 MR. DRATEL: Thank you, your Honor.

20 THE COURT: Okay. I've mentioned this before. A  
21 nonargumentative, neutral statement to be read to the jury  
22 panel to acquaint them with the basic nature. I know I put  
23 something together in connection with coming up with a  
24 questionnaire, which I'm happy to utilize, but if there was  
25 anything that the parties had been working on, you felt you

1 wanted to utilize -- this is under the description of the  
2 case on the first substantive page of the questionnaire:  
3 This is a criminal case in which the United States has  
4 charged four individuals, et cetera. I'm happy to go with  
5 that. If there's anything else you feel you'd like to work  
6 on together, the two sides, to put a little more meat on the  
7 bones, would you let me know?

8 MR. DRATEL: Yes, your Honor.

9 THE COURT: Thank you. Okay. Once again, just  
10 getting back to some of these administrative matters, do you  
11 have any idea as to how many supporters or spectators from  
12 the Somali community may be here?

13 MS. FONTIER: Your Honor, I think we should expect  
14 that the courtroom is going to be full on a daily basis. I  
15 asked them to start coming on the 30th since we will be back  
16 in this courtroom, but I would expect that it would be full.

17 THE COURT: Okay. I'd like to reserve some seating  
18 for -- for any family, friends, and other members of the  
19 Somali community. Obviously we have a limited number of  
20 seats here, and I can certainly -- there are what, 36 seats  
21 in the back. We could certainly make a dozen or so  
22 available, maybe even more. Has anyone been working with the  
23 community here just in terms of outreach and --

24 MS. FONTIER: I'm sorry. I'm very confused as to  
25 what your Honor's saying. I think you were making 12 -- 12

1 seats available to who?

2 THE COURT: The Somali community, people who can  
3 come into the courtroom and -- or more, I mean, if there are  
4 seats available, but at least -- at the least, you know, a  
5 group of seats. We're limited here. It's usually first  
6 come, first served, and there will probably be other members  
7 of the public who are not part of the Somali community who  
8 would want to be here as well. So I'd like to keep a certain  
9 number -- a certain percentage of seats or a certain number  
10 of seats reserved for people and perhaps rotate those seats  
11 so that if there are people waiting to gain access to the  
12 courtroom so they can see part of the proceedings, then  
13 everyone has a chance to do that. I mean have you given any  
14 thought to how you'd like to handle that?

15 MS. MORENO: Well, your Honor, this is the first  
16 I've heard of the Court's pleasure, and we can certainly  
17 communicate that to the community. I do agree with Ms.  
18 Fontier, there are many, many people in the community who, as  
19 your Honor has seen, take a great interest in this case --

20 THE COURT: Sure.

21 MS. MORENO: -- and very supportive of these men.  
22 But I think that -- all these men have large families  
23 themselves individually, so I'm not so sure that 12 seats is  
24 going to be sufficient. But I can certainly communicate to  
25 the community that perhaps they can come on alternate days or



1 I'd certainly be happy to liaison --

2 THE COURT: Well, whatever you can do in that  
3 regard would be appreciated. I would like to create the  
4 sense that everyone has a chance at least to see part of the  
5 proceedings. And, you know, I don't want to reserve the  
6 entire courtroom, nor could I, just for members of the Somali  
7 community, I mean members of the general public. And there  
8 may be some press here, probably in limited numbers, that may  
9 want to follow up the trial; you can't bar the press from the  
10 courtroom.

11 MS. MORENO: You can't bar the press, your Honor?

12 THE COURT: So do what you can. Reach out a little  
13 bit, and I'm certainly open to whatever reasonable  
14 suggestions you might have.

15 MS. MORENO: Thank you.

16 THE COURT: I just want you to know that I've given  
17 that some thought, and I'd like to work with you on that if  
18 possible.

19 MS. MORENO: Will do.

20 THE COURT: Okay. I've been through all the  
21 deposition testimony already, and I've basically made rulings  
22 on the issues that have been identified thus far; I spent a  
23 couple of days doing that. That will probably take some time  
24 to go over that. I'm not inviting additional argument at  
25 this point, although there are a couple of points where I'm

1 going to ask counsel for some clarification or some context  
2 that might be helpful. But I think on most of these --  
3 frankly, on a lot of them, it seems like the objections  
4 should melt away because of other testimony that came in  
5 right after the objection or came in at another part of that  
6 deponent's testimony that, you know, just eliminated the need  
7 for any objection.

8           So I imagine my first question to both sides would  
9 be how -- when do you need these rulings in light of there  
10 being a few other issues we need to talk about this  
11 afternoon; when do you need these rulings for purposes of  
12 going forward? There certainly is quite a bit of testimony,  
13 of evidence coming in that's not objected to, the vast  
14 majority of it, so you can certainly frame your opening  
15 statements as to what's coming in and we can deal with this  
16 at a later time after the trial proper starts; or if you feel  
17 that you need rulings now, then I need a little indication  
18 from you on that.

19           MS. FONTIER: Your Honor, we don't necessarily need  
20 the Court's ruling right at this moment. The jury -- one  
21 thing to keep in mind is that for the objections that are  
22 sustained and the portions that were nontestimonial, we do  
23 need to edit the video --

24           THE COURT: Good point.

25           MS. FONTIER: -- and we need to get those

1 objections out to the tech person who's going to be doing  
2 that for us; so there will be at least a -- I think to be  
3 safe, you should give us a three-day lag between when we get  
4 the objections and when we'll have the videos ready.

5 THE COURT: That's a very good point. I was  
6 actually thinking about that and forgot to raise it myself.  
7 Yeah, you do need time to edit the videotapes. And that  
8 raises the other point, a related point that I observed going  
9 through these deposition transcripts. There's a lot of  
10 colloquy between counsel, a lot of underbrush that can just  
11 be cleared out. Were you planning on doing that?

12 MR. DRATEL: Yes, your Honor.

13 MS. FONTIER: Yes, your Honor. What we did when we  
14 color-coded them is, at least from the defense perspective,  
15 we gave the government a copy that had additional  
16 color-coding that was not to your Honor. There were whole  
17 sections that I highlighted -- I think red was my color of  
18 choice -- for what just needs to be removed entirely, either  
19 objections to form that were sustained --

20 THE COURT: Yeah, I didn't see that. You  
21 communicated that to the government.

22 MS. FONTIER: Yeah. -- or were just colloquy, just  
23 talk that was happening while the tapes were rolling. So all  
24 of those have already been marked out on the transcripts that  
25 the two parties have. What we ended up submitting to your

1 Honor was just the highlighted portions that your Honor would  
2 need to review and not that we had -- we both agreed that  
3 needed to come out.

4 THE COURT: Okay. And I really appreciate the work  
5 both sides did in getting this to me in the way it was  
6 organized. It was pretty helpful and self-explanatory. But  
7 we've been going at this almost a couple of hours now. I'll  
8 be happy to break for anyone or who needs a bit of a rest,  
9 ten minutes.

10 MS. MORENO: Just ten minutes, your Honor.

11 THE COURT: Would you like a break, Ms. Moreno?  
12 Okay. And maybe these gentlemen would as well. Let's take  
13 ten minutes then and then resume promptly. Thank you.

14 (There was a break in the proceedings.)

15 THE COURT: Okay. All counsel are present, and we  
16 have defendants present as well. Mr. Durkin, we've been  
17 talking about administrative matters, scheduling, you know,  
18 we've kind of drifted into a few substantive areas, we'll  
19 probably get into substantive areas as well if we're talking  
20 about rulings on deposition testimony. Are you -- is it  
21 still your intention to waive the interpreter's presence for  
22 your client?

23 MR. DURKIN: Yes, sir.

24 THE COURT: Okay. You've discussed this with him  
25 as well?

1           MR. DURKIN: Yes, he understands. He's -- he'll --  
2 he has a pretty good command of English, and if he needs  
3 anything, he's going to let me know.

4           THE COURT: Very good. Okay. Well, Ms. Fontier,  
5 getting back to you and your need to get the deposition  
6 transcripts in order, how much -- I'm certainly happy to  
7 spend time now going over these rulings if you feel that  
8 would be helpful, or if Monday is too -- is sufficient time,  
9 although we're going to be busy Monday and Tuesday with jury  
10 selection -- the next possible time would be Wednesday. You  
11 want some rulings at this point?

12           MS. FONTIER: No, your Honor. I think Monday would  
13 be fine. And maybe just so that --

14           THE COURT: I don't --

15           MS. FONTIER: -- maybe as things slow down, maybe  
16 we can just address it while the jury's filling out their  
17 questionnaires. We can go through it when we all have our  
18 transcripts and are ready to go.

19           THE COURT: I don't know that we'd have space to do  
20 what. Where were you anticipating doing that?

21           MS. FONTIER: On the floor? I don't know.

22           MR. COLE: One suggestion -- again, your Honor may  
23 know better maybe sort of timing-wise -- but as I understood  
24 it, the jury's going to be excused, we're going to come back  
25 in and go over the questionnaires like about 1:30 on Monday.

1 If that goes all the way to five o'clock, we'll have a little  
2 extra time, but if that doesn't go all the way to 5:00, we  
3 could have time Monday afternoon to turn to the jury  
4 questionnaires, that prereview of the questionnaires, and  
5 turn to the deposition transcripts at that point. The jury  
6 will be gone for the day.

7 MS. FONTIER: Right.

8 THE COURT: Well, we have to review all the  
9 transcripts; keep that in mind --

10 MR. COLE: Right.

11 THE COURT: -- and that's going to take some time.  
12 If we get those back by let's say 1:30 -- let's say we have  
13 60 -- it's going to take I would think a minute or two to go  
14 through each one of those to see if we can red-flag, if they  
15 should be red-flagged. So it's going to be somewhere between  
16 an hour and two hours just to go over those, and it may be  
17 more than 60 we're looking at. So it's going to be 3:30 or  
18 so probably earliest when we're ready to identify those  
19 jurors who can be excused for cause and need not come back  
20 based on their questionnaires. Ms. Fontier?

21 MS. FONTIER: Your Honor, I don't know if Ms. Han  
22 and Mr. Cole are planning to man the photocopiers themselves,  
23 but there's probably at least going to be an hour and a half,  
24 hour, hour and a half break while all the photocopies are  
25 getting done. If Mr. Ward can run the photocopier, maybe we

1 can go through the depositions.

2 THE COURT: Oh, the slings and arrows of outrageous  
3 fortune. You're being very patient with all of this.

4 MS. FONTIER: I'm sure that's why he came from DC.  
5 Seems like we may have a break somewhere in there on Monday  
6 to do it.

7 THE COURT: Well, that's fine. They're done and  
8 ready to go, so if you're comfortable with going over those  
9 Monday or Tuesday, we can defer the individual rulings.

10 Couple of issues arose looking at the trial briefs  
11 that came in, particularly the brief, trial brief of the  
12 government. You know, there were some additional either  
13 requests -- Mr. Cole, if I can focus my comments at this  
14 point for you, or Ms. Han if you prefer. There were some  
15 requests that sort of sounded in the nature of motions in  
16 limine -- Mr. Ward, I wasn't meaning to ignore you, but I  
17 think -- any one of you can step up.

18 Anyway, it seemed like there was some motions in  
19 limine type requests or concerns, there were some categories  
20 of evidence that were identified as not being admissible  
21 under the rule of completeness or under 803 (3), so those  
22 issues have been more or less joined in a very general way.

23 MR. COLE: I'm sorry. The government's intention  
24 in that was just to brief legal matters in the trial memo,  
25 not to ask you to address a specific issue --

1 THE COURT: Okay.

2 MR. COLE: -- until one arises.

3 THE COURT: Okay. May I just share some of my  
4 thoughts here after going through your brief? I think that  
5 within the context of this case, you may be giving Evidence  
6 Code Section 106 and the rule of completeness a bit too  
7 narrow an application. I don't know what is contained -- I  
8 mean I haven't gone through all of the intercepts; I've seen  
9 some of them, many I have not seen.

10 I think when we're talking about the confluence of  
11 106 and 803 (3), a statement made evidencing an existing  
12 state of mind, ultimately my sense is that a lot of these  
13 statements made by defendants are going to come in under one  
14 section or the other. You know, cases like Ortega and  
15 Collicot and maybe a few others dealt with scenarios where --  
16 well, let's take Ortega, for example. You had a confession,  
17 you had a full-blown confession that was recorded. It was a  
18 drug case, and I guess it was kept out in the government's  
19 case-in-chief; it came in, because there had been a Miranda  
20 problem, on rebuttal or for impeachment purposes later, but  
21 then there was the statement that was made by Ortega that he  
22 wanted to come in, and that related to how he had acquired  
23 the gun in the case, his cousin had given him the gun to  
24 shoot chickens or something like that, and -- as if that were  
25 an exculpatory matter. I mean if he had a gun, the gun was



1 with the drugs, he had possession of both the drugs -- the  
2 methamphetamine -- and the firearm. So he wanted that to  
3 come in because without that the confession would be  
4 distorted somehow. I mean I could certainly see the wisdom  
5 of keeping it out. It didn't distort his confession, it was  
6 something else entirely. And it didn't tend to mislead the  
7 jury on the nature and effect of the confession that he made.

8           In this -- in these tapes and in this case, it  
9 seems to me we're dealing with a different kind of statement.  
10 A lot of these statements are verbal acts. They seem to have  
11 independent legal significance. They're not being offered  
12 for the truth of the matter, they're being offered for  
13 another purpose. Now, they have independent legal  
14 significance. Your -- I mean that's an argument you want to  
15 make for the statements that you want to have admitted. But  
16 if, for example -- to take this away from this particular  
17 context -- the sale of Blackacre: A offers to sell Blackacre  
18 to B, and Blackacre says I accept. You know, each one those  
19 statements have independent legal significance, offer and  
20 acceptance. Many of the statements here that the government  
21 will use against individuals, defendants I'm assuming, have  
22 independent legal significance. This money is for the boys  
23 with the bullets or a statement, coming back, this will --  
24 this will go for our efforts against the Ethiopians or bombs  
25 will be purchased, whatever. Those are independent legal --

1 verbal acts that have independent legal significance.  
2 They're not really being offered for the truth of the matter  
3 but the fact that they were said and they're indicative of  
4 certain knowledge and a certain intent.

5           If you have statements made by the same individuals  
6 that indicate a different intent and are reflective of a  
7 then-existing state of mind, it doesn't seem to me that  
8 they're being offered for the truth of the matter. Now, they  
9 may contain -- they may be a -- it may be a hybrid statement;  
10 it may -- part of the statement may be offered for the truth  
11 of the matter, but part of the statement is a directive, for  
12 example: Don't use this for bullets, direct this to drought  
13 relief.

14           Your -- I get the impression going through your  
15 papers here, your trial brief, that you would object to a  
16 statement made at or about the same time that these  
17 conversations are taking place by a defendant, "This is to go  
18 for drought relief," you would object to it on the basis of  
19 hearsay, self-serving hearsay, and that it's not part of any  
20 rule of completeness. So I wanted to give you an -- excuse  
21 me for the interruption -- I wanted to give you an  
22 opportunity to respond to that. That's part of the issue I  
23 had or the concern I had going through your trial brief and  
24 some of the deposition testimony as well.

25           MR. COLE: Okay. What the government was most

1 concerned with is the notion -- and I'm not trying to put --  
2 I'm not saying this has been the defense's position because  
3 they haven't stated it this way, but I've had it stated this  
4 way many times in other cases, that because something is  
5 played from a tape, it therefore follows that the whole tape  
6 falls under the rule of completeness, or because something is  
7 played from this recording, this jail call -- just to take it  
8 out of context -- I'm going to play those other jail calls.  
9 And the government's main point is that -- which perhaps  
10 isn't in dispute -- but is that that's not how it works;  
11 there has to be a determination that that other portion -- if  
12 it's admissible in its own right unrelated to the rule of  
13 completeness because it's not hearsay, if it's not hearsay,  
14 then our rule of completeness argument isn't going to matter  
15 anyways because it's not hearsay. So if it's an imperative  
16 or if it's a question or if it's something that doesn't even  
17 qualify as hearsay, then obviously they could admit it  
18 without the rule of completeness; but if it's hearsay, our  
19 point was simply that we would want a determination that that  
20 portion they seek to admit in fact -- in fact corrects a  
21 distortion that would otherwise occur.

22           And the reason that's important is because what we  
23 understand the defense wants to do is play phone calls that  
24 we're not playing at all. Now, it may be that they can  
25 convince the Court that those phone calls aren't hearsay for

1 some other reason apart from the rule of completeness, but if  
2 they want to play a phone call of their own client that we're  
3 not even playing, therefore, it isn't -- it isn't the case  
4 that we spliced the call right in the middle to make sure  
5 they didn't hear the part where he said when I say blue, I  
6 mean red, then there needs to be a determination well, how is  
7 that call -- how does that call clear up a distortion in us  
8 playing only a portion of the second call? And unless that's  
9 the case, we shouldn't be talking about the rule of  
10 completeness, we should only be talking about some other  
11 independent basis for them to admit the call as nonhearsay if  
12 they can.

13 And we think that calls, for example -- and this is  
14 a -- at this point we start talking about hypotheticals; this  
15 is sort of in a vacuum for your Honor, I understand, because  
16 we haven't put any concrete --

17 THE COURT: May I stop you for just moment --

18 MR. COLE: Yes.

19 THE COURT: -- and let's stay on the rule of  
20 completeness first. And it's judicial gloss that has created  
21 this -- this reference to distortion, the other part of the  
22 tape can be played if the initial part would distort the  
23 meaning. And if you look at those cases, I think those cases  
24 -- that doctrine arose within the context of criminal cases.  
25 You have a confession on it, yeah, I knew there were drugs in

1 the car, whatever, but, you know, I had this -- I had this  
2 meeting with this guy and gosh, yeah, he told me -- you know,  
3 then in comes the exculpatory part. The exculpatory part  
4 just, you know, the allegedly exculpatory part, doesn't  
5 really distort the confession when it comes to knowledge of  
6 the drugs. And so I think the -- I think the rule of  
7 distortion was probably developed judicially specifically for  
8 cases where you have a confession and then you have the  
9 so-called extenuating circumstances, you have the defense,  
10 you have the excuse -- no, that doesn't come in. I mean  
11 defendant's got to take the stand if he wants to have that  
12 type of evidence come in.

13           If you're talking about -- once again, if you're in  
14 the realm, even if it's a criminal case, where you're not  
15 talking about confessions, you're talking about statements  
16 that are made that are evidencing a certain intent that are  
17 going to be used by the government against an individual, I  
18 think that other statements related to that particular intent  
19 at or about that particular point in time may well have a  
20 stronger argument for admission under the rule of  
21 completeness than in those cases that created this  
22 distortion/judicial gloss under 106. 106 says nothing about  
23 distortion, does it?

24           MR. COLE: Well, it doesn't say anything about  
25 distortion, but it says that the Court determines in fairness

1 I believe is the word --

2 THE COURT: Exactly.

3 MR. COLE: -- used, "in fairness," and I think the  
4 Courts look at well, what does fairness require, and --

5 THE COURT: Right.

6 MR. COLE: -- and guess the point I'm making  
7 though, your Honor, is I would argue if the call -- and  
8 again, if the defense has a basis that the Court agrees with  
9 that -- let's take a call that isn't played at all by the  
10 government. If defense has a basis for saying it's not  
11 hearsay, so be it, you know, we'll object, and if the Court  
12 finds it's not hearsay, this discussion's over. But if  
13 it's -- let's take, for example, if they have an independent  
14 call at some other time, not the call we're playing, where  
15 they're talking about funding an orphanage, unless they can  
16 show -- and they want to rely on the rule of completeness,  
17 okay -- unless they can show that it is truly a distortion or  
18 not fair because that is in fact about the same conversation  
19 they're having here or it is in fact the context for this  
20 call, then if they want to make that link without showing  
21 that -- that connection to the call we're playing, then the  
22 defendant ought to make that link on the stand under  
23 cross-examination because otherwise all you have is  
24 independent calls where they're talking about another call, a  
25 different call, where they're talking about fundraising for a

1 different purpose. And if they can put that in, the jury  
2 never gets to have the defendant cross-examined on what that  
3 actually related to, what the state of mind actually was;  
4 they're just putting in hearsay calls that are then used to  
5 claim that that somehow --

6 THE COURT: No, it's not a hearsay. Would it be  
7 hearsay or would it be a statement of intent at a particular  
8 point in time and therefore admissible under 803? The  
9 question -- 803 (3). The question becomes whether or not  
10 it's relevant.

11 MR. COLE: Yes. Well, it's relevant -- if it's not  
12 offered for its truth, then they have to show its relevance,  
13 and it's relevant then -- how do they show that relevance  
14 without cross-examination of the declarant? Unless your  
15 Honor can see the relevance on its face because it's about  
16 the same thing they're discussing in our calls, then it won't  
17 be relevant except for its truth is our point. And so -- and  
18 the jury -- anyways, that was the thinking is -- I don't  
19 disagree with -- I just -- the government anticipates a fair  
20 amount of this coming up and just wanted to lay out, in our  
21 mind at least, the different buckets that -- you know, that  
22 we need to walk through.

23 THE COURT: And in this area of relevance, you've  
24 taken a fairly narrow view as well, and I don't mean that in  
25 a critical way, but, for example, you were objecting in the

1 deposition transcripts to some of the colloquy undertaken  
2 between the deponent and one of the defendants -- usually it  
3 was defendant Moalin -- and it was related to, you know,  
4 drought relief efforts or orphanage issues, or those kind of  
5 things. You were saying that that's -- you were objecting on  
6 the basis of relevance because it had nothing to do with the  
7 specific calls or contributions that were -- that are the  
8 subject of the charging indictment. So you're saying look,  
9 if it doesn't have -- if you can't nail this particular  
10 conversation to a particular donation or amount of money that  
11 was sent at a particular point in time, then it's not  
12 relevant. I don't know that I draw relevance as narrowly as  
13 you're indicating.

14           If you have a statement, if you have a -- and we've  
15 already been through this in motions in limine -- you have a  
16 conversation relative to a particular donation being made and  
17 that there's a call relative to that donation, there's  
18 discussion about an orphanage or discussion about drought  
19 relief at about the same point in time --

20           MR. COLE: Sure.

21           THE COURT: -- then the question -- and it's not  
22 really hearsay, it's a directive, it's an imperative. So  
23 it's not really offered for the truth of the matter, it's  
24 just being offered for the fact that it was in fact made,  
25 it's indicative of money being sent for a particular purpose



1 having nothing to do with al-Shabaab and is at a relatively  
2 relevant point in time reflective of the state of mind.

3 Okay, fine, that may come in.

4 MR. COLE: Understood. Understood, your Honor.

5 And I guess though -- you know, interesting point about those  
6 depositions -- and the defense may disagree, may see them  
7 differently -- but of all those witnesses, no one, not a  
8 single one of them ever even ventured to claim that any of  
9 the transactions that we allege in the indictment were  
10 received by them or that they knew -- or that they could  
11 account for where that money went. So you have this penumbra  
12 of help for the poor all building -- being built up. And I  
13 understand it's relevant; I understand that's their defense;  
14 I'm not seeking --

15 THE COURT: Doesn't that get to the credibility of  
16 the deponents?

17 MR. COLE: Right.

18 THE COURT: As they're saying, they've never taken  
19 up arms and aligned with al-Shabaab, they've never, you know,  
20 done anything, they've never engaged in any bad acts, they've  
21 all been, you know, pure in thought and deed. I mean I could  
22 sense the frustration you were having, particularly with  
23 Hassan at the end of your examination of him. But that kind  
24 of goes to credibility and the jury's assessment of all the  
25 evidence, doesn't it?

1           MR. COLE: We are not -- it may sound like we're  
2 trying -- perhaps -- we are not trying to be that strict  
3 obviously with our view of relevance. We know the defense is  
4 going to be, to some extent, based on the notion that this  
5 was for -- this money was for charity, and that's their  
6 defense and they ought to be able to present their defense.  
7 And we will be playing in our own case calls that have  
8 references to the ILYAS Foundation or the drought that was  
9 going on and their concern over that. And -- but to --  
10 without the defendants taking the stand, there has to be a  
11 limit to the extent -- well, without the defendants taking  
12 the stand or some witness who's actually -- well, who else  
13 can speak to their intent other than the defendants? But in  
14 any event, without someone taking the stand at some point,  
15 how many times are they going to play a call --

16           THE COURT: Well, no one has to speak to their  
17 intent. The intent may or may not be there based on -- I  
18 mean intent may be inferred from the other evidence.

19           MR. COLE: Yes.

20           THE COURT: And you're going to have the  
21 depositions coming in in any event.

22           MR. COLE: Yes.

23           THE COURT: All right. So in a sense those are  
24 people taking the stand or whose testimony is going to be  
25 considered as if they had taken the stand.

1 MR. COLE: Yes, right, right, right. But -- well,  
2 maybe enough's been said. I just -- I just think the point  
3 is though is that as long as the Court -- it sounds -- the  
4 Court already obviously understands and has thought through  
5 this whole issue. So as the calls come up, I'm sure the  
6 Court will make appropriate rulings.

7 THE COURT: Yeah, you know, and the calls are going  
8 to come up, the statements will be there. Some of them may  
9 be hybrids, some may come in, some may not come in, parts of  
10 others may come and in with --

11 MR. COLE: Sure, right.

12 THE COURT: -- others excluded. But to the extent  
13 that the trial brief seem to take a pretty firm stance on any  
14 other calls being automatically hearsay or outside the rule  
15 of completeness, I wanted to raise that issue now because I  
16 think there are grounds which arguably may sustain the  
17 admissibility of what I anticipate is going to be proffered  
18 by the defense by way of some of these calls and some of the  
19 deposition testimony as well to which you objected. Just a  
20 bit of a head's up.

21 MR. COLE: Okay.

22 THE COURT: The other thing -- I wanted to mention  
23 one other thing. I want to revisit the al-Qaeda issue. And  
24 help me out with this. I go through -- I go through this  
25 entire binder of deposition transcript material, and correct

1 me if I'm wrong, but I didn't see one reference to al-Qaeda  
2 in any of the questions or any of the testimony given. Am I  
3 correct in that?

4 MR. COLE: I assume you're right. I don't recall  
5 any specific reference.

6 THE COURT: I was looking for it. I may have  
7 missed it, got a little bleary eyed the second day of going  
8 through that, particularly because of the structure of some  
9 of the Q and A and a lot of the colloquy -- I know it's going  
10 to be swept out -- I tried to catch everything. Here's my --  
11 what I want to discuss with you.

12 Initially when we were discussing motions in  
13 limine, I said okay, a reference to al-Qaeda may be made by  
14 Bryden because apparently he's going to refer to al-Qaeda  
15 somehow in the overall structure, history, culture of some  
16 al-Shabaab kind of connection, so on and so forth. I see --  
17 I see no connection mentioned in any -- any of the material  
18 before me, any of the evidence before me at this point, so I  
19 question the value, the probative value, of a quick reference  
20 to al-Qaeda by Mr. Bryden as he's playing out his testimony  
21 in this case; I'm assuming he'll testify. Is the probative  
22 value outweighed by undue prejudice here?

23 We know the mention of al-Qaeda is a hot-button  
24 deal; I mean we have to recognize that. We've -- I know  
25 we've all seen links -- well, we've all seen al-Shabaab

1 referred to at one time or another in news reports as an  
2 al-Qaeda affiliate or linked to al-Qaeda. I don't know  
3 exactly what that means, but at this point I'm thinking you  
4 know, I've been through all the deposition testimony, I've  
5 been through some of the calls, not all of them by any  
6 measure, I've seen no reference to al-Qaeda. I saw no  
7 questions related to al-Qaeda. I saw questions related to  
8 Ethiopia and to a myriad of clans and subclans and  
9 sub-subclans, to the Union of Islamic Courts, to Ethiopians,  
10 to militias, police forces in the Galguduud region -- I mean  
11 so many different groups. There's no evidence that any of  
12 these individuals, the players, including some of the alleged  
13 bad guys that you may have deposed, that they ever got any  
14 training from al-Qaeda, that they were supported by al-Qaeda,  
15 they weren't -- go ahead. I've said enough. You know my  
16 concern.

17 MR. COLE: I know where you're at. Two things.  
18 First, there would be no reason for us to ask any of those  
19 deponents that. These are the defense's witnesses. We're  
20 not accusing those defense witnesses of anything. Those  
21 really aren't bad guys; they're the people they've proffered  
22 up to show the defendants are good guys. And we had a --  
23 Hassan Guled, for example, was proffered by the -- or was  
24 presented by the defense to claim that he is the person they  
25 were speaking to on the phone, that he is Sheikalow; that's

1 the reason that he testified. We have no reason to accuse  
2 Hassan Guled, the man who's shown in deposition, of being  
3 part of anything wrong. We now have to show the jury that  
4 when they claim that he's Sheikalow on the phone, that's  
5 nonsense. And that's what we intend to strive to do in our  
6 case.

7           So the fact that there's no reference of al-Qaeda  
8 in depositions shouldn't be used, in my view, as any  
9 barometer because those witnesses were selected by the  
10 defense, the reason they're being called has nothing to do  
11 with the reason that we want to make a reference to al-Qaeda  
12 in the case. The calls actually do, but I want to -- the  
13 calls actually -- the calls themselves, there actually are  
14 references to al-Qaeda. There's one in particular --

15           THE COURT: The calls what now?

16           MR. COLE: The calls actually do have reference to  
17 al-Qaeda. There's one call in particular where Aden Ayrow --  
18 the defense would say Hassan Guled -- complains that his  
19 enemies --

20           THE COURT: Whoa, whoa, defense wouldn't say Hassan  
21 Guled, would they?

22           MR. COLE: Well --

23           THE COURT: Aden Ayrow is not Hassan --

24           MR. COLE: No, no, no.

25           THE COURT: Sheikalow --

1           MR. COLE: Sheikalow, the person in the phone call,  
2 who is always called Sheikalow -- well, not always called  
3 Sheikalow but typically called Sheikalow, our argument to the  
4 jury is that's Aden Ayrow; that guy -- that's a code name for  
5 Aden Ayrow.

6           THE COURT: That I see in the papers, okay.

7           MR. COLE: Their argument to the jury is that's  
8 Hassan Guled, the guy you saw testify on the deposition. And  
9 so that now puts into play -- that now requires us to  
10 convince the jury that the person who testified at the  
11 deposition, that's not the guy on the phone, that's not  
12 Sheikalow on the phone, and here's all the reasons you can  
13 conclude that. You have to now listen -- we have to now go  
14 through the calls and explain why the references in the calls  
15 make no sense whatsoever that they would relate to this  
16 Hassan Guled, who is proffered as this clan police chief.  
17 And one of the calls, for example, that is in the case, it  
18 talks about Aden Ayrow, Sheikalow, complaining that his  
19 enemies are accusing him of being al-Qaeda, and chasing him  
20 to the ends of the earth. Okay.

21           But even backing up from the calls, the reason --  
22 the reason is we articulated before; the reason that the  
23 al-Qaeda link is most relevant for us is for a limited  
24 reason, and you're not going to see it all over the case  
25 because we -- well, one, we know you don't want to see it all

1 over the case and it should only be there to the extent that  
2 it is probative, and we don't want to overdo it. But here's  
3 the thing. The defense pointed out in their motions in  
4 limine that they're -- they're putting a tremendous amount of  
5 significance on the date of the designation and were even  
6 arguing in their motions in limine, which have been ruled on  
7 now, but arguing that stuff that happened before the  
8 designation date is somehow not criminal or it was perfectly  
9 fine to send money to al-Shabaab before that, it couldn't be  
10 criminal until February the 26th or March the 18th when it  
11 was publicized, and that time period from December 21st --  
12 well, in the indictment it's beginning on a date unknown, but  
13 the first audio call being December 21, 2007 -- that time  
14 period from December 21, 2007 to March 18th when the  
15 designation is published in the Federal Register, that is in  
16 play for the government, that is in our offense conduct.  
17 That period is charged -- it's not charged under 2339 (b) but  
18 it's charged under other counts in the indictment, and there  
19 those counts, the count 2339 (a) and the money laundering  
20 conspiracy with that (a) charge as a predicate and then the  
21 substantive 2339 (a) count, that does not require proof of  
22 giving money to al-Shabaab; that requires proof of giving  
23 money to support the predicates we allege, which is killing  
24 overseas and use of a weapon of mass destruction. And so  
25 therefore to limit us only to al-Shabaab -- we want to prove



1 knowledge, that these men had knowledge, and we want to make  
2 that argument circumstantially, we want to put in the  
3 references to al-Qaeda to show the jury that Aden Ayrow, who  
4 they were giving money to then, they were giving money to  
5 Aden Ayrow in that window of time before the designation,  
6 that Aden Ayrow had links to al-Qaeda that were known, that  
7 were leading to his notoriety and fame, and therefore we can  
8 argue inferentially to the jury that when they gave money to  
9 him, of course they had the intent to kill.

10 THE COURT: What's the evidence that he had -- that  
11 Ayrow had a link to al-Qaeda --

12 MR. COLE: That will become --

13 THE COURT: -- the statement he made, my enemies  
14 are accusing me of being al-Qaeda?

15 MR. COLE: No, it would be the testimony of -- the  
16 expert testimony concerning the history of al-Shabaab and  
17 Aden Ayrow and the, you know, what was being -- you know, it  
18 will be -- the expert testimony will be. And so that's the  
19 only place -- other than a passing reference in a phone call,  
20 the only place we're going to bring up al-Qaeda by name, any  
21 reference to it like that, will be during the testimony of  
22 Matt Bryden briefly, and it's not going to be dwelled on,  
23 it's not going to be extensive, but it's going to be  
24 saying -- it's going to be -- basically, the reason we're  
25 bringing it up is to tell the truth.

1           THE COURT: But what's the probative value of it?  
2 I mean you've got Ayrow as one of the leaders of Shabaab;  
3 even the deponents are saying he's Shabaab, and the defense  
4 isn't taking issue with Shabaab being a terrorist  
5 organization or certified as such as of February 26, '08 and  
6 then later published. So you've got -- you've got al-Shabaab  
7 as a terrorist organization, you've got Ayrow -- everybody  
8 agrees Ayrow -- I assume everybody agrees Ayrow is Shabaab  
9 and affiliated with a terrorist organization. What is the  
10 probative value of a very brief mention of al-Qaeda --

11           MR. COLE: Well, if --

12           THE COURT: -- by an expert witness?

13           MR. COLE: If the defense is going to agree -- or  
14 will they argue against -- that if we prove they were giving  
15 money to Aden Ayrow -- if the jury concludes that Sheikalow  
16 in December or January or February, before the designation,  
17 that if we convince the jury that it was Aden Ayrow they're  
18 giving money to, that it follows automatically that these  
19 defendants gave the money with the intent to kill and use  
20 weapons of mass destruction in Somalia, if they're ready to  
21 go there and stipulate to that, then we don't need any  
22 reference to al-Qaeda. But if they're not going to stipulate  
23 to that, then we've got to convince the jury what a person in  
24 their situation -- excuse me for pointing -- what a person in  
25 the defendants' situation would know and intend when they

1 give money to a man with his reputation, history, and  
2 background. You intend the natural consequences of your  
3 actions. And so I've never heard the defense say --

4 THE COURT: What is the testimony -- Mr. Cole, what  
5 is the testimony going to be with respect to Ayrow's  
6 background?

7 MR. COLE: It's laid out in the trial memo. It's  
8 just -- it's going to be that he trained in Afghanistan, that  
9 he grew up in the Council of Islamic Courts, that he harbored  
10 al-Qaeda operatives and therefore had his home attacked.

11 THE COURT: And this is based on what now --

12 MR. COLE: Expert testimony.

13 THE COURT: -- on Bryden? This is Bryden's going  
14 to testify?

15 MR. COLE: Yes. And it's limited to what's in the  
16 trial memo. There's not going to be any visuals of people,  
17 dead people, or there's not going to be a picture of bin  
18 Laden or Zawahiri or anyone from al-Qaeda.

19 THE COURT: To whom did Ayrow make the statement  
20 "even my enemies" -- well, you made that reference earlier --  
21 even my enemies accuse me of being al-Qaeda.

22 MR. COLE: That's a gross -- I mean that's a  
23 paraphrase. But the word "al-Qaeda," I mean I can't remember  
24 the exact wording, but -- I actually might be able to find  
25 it; I have the calls. But the word "al-Qaeda" is right

1 there, and it's in the context of saying I'm being -- they're  
2 accusing me of being al-Qaeda. That's to Mr. Moalin.

3 THE COURT: Who did he say that to?

4 MR. COLE: Mr. Moalin. Well, again, the defense  
5 would say that was Hassan Guled, the police commissioner, who  
6 said that, but we say it's Aden Ayrow who said that. And --  
7 and we understand. I mean this is not --

8 THE COURT: Tell me what that conversation was --  
9 refresh my memory -- after Ayrow made that -- allegedly made  
10 that statement to -- to Mr. Moalin you indicated?

11 MR. COLE: Yes.

12 THE COURT: Okay. What was --

13 MR. COLE: All of his statements were to  
14 Mr. Moalin.

15 THE COURT: Okay. What was -- right after that --  
16 that statement by Ayrow where he mentioned al-Qaeda, what was  
17 the rest of the conversation; do you know?

18 MR. COLE: We'll have to try to find it. I have to  
19 find -- I mean I know -- he would have long conversations  
20 with Mr. Moalin about the state of affairs, disagreements  
21 between Shabaab's position and the Alliance for the  
22 Reliberation of Somalia, different -- Ayrow would and  
23 Mr. Moalin would debate and discuss whether Shabaab should  
24 agree with certain people in Somalia or not agree, whether  
25 certain clan members were or were not hypocrites because of

1 the positions they were taking, and they would have these  
2 conversations. And Aden Ayrow would frequently complain that  
3 he felt that he -- that he was -- that the clans or the  
4 people in Somalia were siding with people who were weak or  
5 who were hypocritical who were off flying to foreign  
6 countries to meet with foreign people while he's back at home  
7 actually doing the fighting. And there's -- here it is.  
8 This is a -- specifically this is a January 20th call,  
9 January 20th at 1718, and he says about -- this is Sheikalow,  
10 okay, who we say is Ayrow -- "about the disagreement, the  
11 disagreement, we are wanted because of our beliefs. How can  
12 we sit with someone who's looking for us, killing us, and  
13 claiming he is fighting al-Qaeda?" And Mr. Moalin, "uh-huh,"  
14 says "uh-huh." And then Sheikalow goes on: "What are we?  
15 Am I a devil? I prefer Abdullahi Yusuf" -- who was the  
16 president of the TFG at the time -- because he's a powerful  
17 man who's working with Ethiopians and not with them. And  
18 what he's saying is -- the context that of that call is that  
19 Ayrow's saying I'd rather deal -- I'd rather deal with the  
20 president of Ethiopia than my fellow jihadists who are off in  
21 this other group trying to seek a peace accord -- because  
22 they were off trying to have peace talks, this Alliance for  
23 the Reliberation of Somalia, and he's basically saying I  
24 don't want anything to do with those people, they're out  
25 there isolating me as the guy who is al-Qaeda while I'm out

1 here doing the real fighting. That's what the context, as we  
2 read the calls, is basically saying. And, you know, here we  
3 have them claiming this is the police chief of the small town  
4 of Guriel supposedly having these conversations. We need to  
5 be able to argue this to the jury and explain why all of  
6 these -- why they should -- this is -- after they hear Matt  
7 Bryden testify and hear other evidence, they need to be able  
8 to hear these calls and say is this Aden Ayrow on the phone  
9 or is this Hassan Guled, and --

10 THE COURT: What is -- you're confident Bryden has  
11 a foundation, a sufficient foundation for testifying that  
12 Ayrow was linked to al-Qaeda?

13 MR. COLE: Yeah. And on that score, your Honor, we  
14 think that Mr. Bryden -- and of course the defense will I'm  
15 sure have their own opinion and will want to cross-examine  
16 him -- but we think he's a preeminent expert in the area.  
17 It's been his life's work. And not only that, the truth --

18 THE COURT: What does he base that on? What does  
19 he base that opinion on?

20 MR. COLE: Years of research. He was the U.N.  
21 Security Council Chief Monitor for Somalia for an extensive  
22 period of time, attempting to monitor the trafficking of arms  
23 in Somalia, the insurgent groups in Somalia for the U.N. He  
24 was -- he was -- that was his work was to be there studying  
25 everything he could about the conflict, why it was happening,

1 and what could be done to improve the peace and security of  
2 the region.

3 And I'll tell you, your Honor, the truth of it  
4 isn't even what's relevant because we're offering it for  
5 knowledge and intent. It doesn't even matter if everything  
6 that was reported about Ayrow is true. What matters is what  
7 he was famous -- what he was known for because that's what  
8 goes to knowledge and intent. And so, you know, that's the  
9 realm of this is the who he was, what his public image and  
10 notoriety and reputation was because that is what would go to  
11 knowledge and intent.

12 MR. DRATEL: Just, your Honor -- may defendants  
13 briefly respond, your Honor --

14 THE COURT: Sure.

15 MR. DRATEL: -- all points? First, to permit  
16 the -- well, for the government to argue to the jury that at  
17 the end of this case that the defendants would be guilty of  
18 violating 2339 (a) because they gave money ultimately for the  
19 purpose that had anything to do with al-Qaeda would be an  
20 amendment of the indictment of serious degree.

21 THE COURT: I don't think that's what Mr. Cole  
22 intends to do --

23 MR. DRATEL: Well --

24 THE COURT: -- and I don't think -- I don't get  
25 that sense at all.

1 MR. DRATEL: Okay. But I think that's where it's  
2 going because we've heard this -- that they need that to show  
3 that that's -- that they can prove the 2339 (a) even if it's  
4 not -- even if al-Shabaab isn't designated; so that's number  
5 1.

6 Number 2 is it highlights dramatically the need to  
7 define the 956 conspiracy now before we go to trial, to make  
8 them do it, because otherwise the 956 conspiracy can mean  
9 anything they want it to be whenever the case ends, and  
10 that's a big problem.

11 Second, the 2339 (a) charge, the government wants  
12 to merge it with (b) and say it's to a organization. It's  
13 not about an organization. That's why there's a specific  
14 intent requirement. You can give money to any organization  
15 under (a) if you have the specific intent that it not -- or,  
16 rather, if you lack the specific intent to do it criminally,  
17 in other words, to kill, maim, murder, et cetera. So it's  
18 not tied to an organization specifically; it's about the  
19 purpose of the material support, you know, what's defined as  
20 material support. It's not about where it goes; it's about  
21 why it goes.

22 Third -- fourth is it's bootstrapping to such a  
23 significant degree in the sense that to take al-Qaeda, the  
24 most toxic two words you can have in a courtroom, and use  
25 that to bootstrap a failure, number 1, to prove the purpose



1 of these donations at a time when al-Shabaab is not  
2 designated; and second, to be a substitute for the fact that  
3 they can't prove it's Aden Ayrow on the phone calls. This is  
4 what this is about. And that particular phone call, it's the  
5 exact opposite inference that's reasonably drawn. When he  
6 says people that claim me I'm al-Qaeda, he says I'm not  
7 al-Qaeda; that's what he's really saying in that  
8 conversation. They claim -- how do I sit down with a guy who  
9 claims that I'm al-Qaeda. You wouldn't sit down with someone  
10 who claims you're al-Qaeda if you're al-Qaeda.

11 THE COURT: What Mr. Cole is saying is, you know,  
12 he might have been disclaiming it then, but there's going to  
13 be evidence that he was in fact al-Qaeda.

14 MR. DRATEL: I understand that, but --

15 THE COURT: You're saying he can't prove --  
16 ultimately he can't prove that. But should this Court say  
17 well, because there's a chance you won't prove it, you can't  
18 mention it?

19 MR. DRATEL: No, no, but if this claim -- we're  
20 talking about the inference is not about him saying I am  
21 al-Qaeda, it's the opposite. But the other part is I would  
22 also object to Mr. Bryden -- well, let me put it this way,  
23 that it would be -- it would be Rule 29 territory if they  
24 come in with Mr. Bryden saying what's rumored about Aden  
25 Ayrow, they can't prove that it's true, that somehow the

1 defendants are saddled with rumor as opposed to what's true,  
2 sort of they're supposed to believe every rumor they hear  
3 about everything, and that puts them on notice with that  
4 knowledge and intent, as opposed to what they might know or  
5 what's proven. That's an extraordinary leap here. So in  
6 other words, his reputation is X. Doesn't matter what it  
7 really is and that they might know something different than  
8 what his reputation is or may not believe that reputation  
9 when they act, but that reputation would serve as adequate  
10 notice to satisfy the intent element, that to me is just not  
11 permissible. So those are -- I think I've covered my  
12 grounds. Thank you, your Honor.

13 THE COURT: Okay. No need to respond. I just  
14 wanted to point out a couple of concerns I had; I did that  
15 with the issues that were referred to in the brief on the  
16 rule of completeness and the 803 (3) issues.

17 Okay. It's pushing four o'clock. I can begin to  
18 go over some deposition rulings if you'd like at this point,  
19 or if you'd like to call it, we can call it at this point.

20 MR. DURKIN: Judge, could I be heard on one issue?

21 THE COURT: Sure.

22 MR. DURKIN: I'd like to tender you a document I  
23 just got.

24 THE COURT: Has the government seen this?

25 MR. DURKIN: Yes, I've given this to Mr. Cole.

1 This is a death certificate of my client's three-year-old  
2 daughter, Judge, who died on November 19, 2012. As you can  
3 see at the bottom where it says cause of death, severe acute  
4 malnutrition.

5 THE COURT: My sympathies to your client.

6 MR. DURKIN: Well, mine as well, but the reason I  
7 raise it, other than the obvious irony of it, is that I  
8 didn't learn of this until this week. His sister and  
9 brother-in-law came down from Minnesota to see me this week  
10 and told me about it. They told him -- they told me that  
11 they had asked my client to tell me about it but that he told  
12 them that he was just too distraught to bring it up --

13 THE COURT: Okay.

14 MR. DURKIN: -- which leaves me in a very awkward  
15 position. And the request I'm making -- I spoke to him  
16 briefly today; he appears okay. I did -- as soon as I heard  
17 this -- there's someone at the MCC who's pretty good about  
18 getting us a call if it's an emergency, and actually I think  
19 we sent him an email and he called us right away, and he  
20 confirmed what his brother-in-law had told me, that he simply  
21 was too distraught and really just can't deal with it so he'd  
22 rather not talk about it. And I know I'm causing him trouble  
23 bringing it up today, but I want to make sure that he's  
24 medically okay to proceed to trial. I think he is, but I  
25 think as an officer of the Court I would request that at

1 least he be -- that he see a psychiatrist. He has not seen  
2 anyone. He says he originally was -- when he was first  
3 arrested, apparently there was a psychiatrist at the MCC that  
4 had seen him, but I would feel remiss if I didn't raise it  
5 now and find out either in the middle --

6 THE COURT: You just learned about it, Mr. Durkin?

7 MR. DURKIN: I literally learned about it Monday  
8 night and then I sent him an email on Tuesday, I spoke to him  
9 I think it was Wednesday, I think I spoke to Mr. Cole about  
10 it on Wednesday, I got the death certificate yesterday, I  
11 sent it to Mr. Cole. I was hoping that maybe we'd get some  
12 humanitarian relief, but I understand --

13 THE COURT: Have you talked to anyone at MCC, any  
14 of the people --

15 MR. DURKIN: I have not.

16 THE COURT: -- there? Would you -- with the  
17 permission of your client, could you contact MCC -- they're  
18 usually pretty good about these things -- and let them know  
19 what your concern is and suggest to them that he be evaluated  
20 if you feel -- you feel there's a need --

21 MR. DURKIN: I spoke with him today, and he said  
22 that that was acceptable. Could I just speak to him again?

23 THE COURT: Sure.

24 (Brief pause.)

25 MR. DURKIN: That's acceptable.

1 THE COURT: Okay. They're usually pretty good  
2 about that, and --

3 MR. DURKIN: Well, that's fine. I just -- you  
4 understand I just --

5 THE COURT: Sure.

6 MR. DURKIN: -- feel as an officer of the Court  
7 that I think it's an issue that we need to --

8 THE COURT: Well, you've given me this; you've  
9 notified me. I'm certainly sympathetic for obvious reasons.  
10 And as I say, if you're concerned, if you're concerned out of  
11 observations that you're making that you could put in a  
12 declaration -- and I'm not talking about any rulings to be  
13 made by the Court at this time -- but if you feel that  
14 there's a need for him to be evaluated at this point, it  
15 would certainly help for you to put your observations in a  
16 proper form. But pending that, just advise the authorities  
17 at MCC where he is that it would be appropriate for him to be  
18 medically evaluated at this time. I would certainly  
19 recommend it just based upon your representation.

20 MR. DURKIN: No, that's -- I intend to do that. My  
21 concern -- the only observation I can make and what my  
22 concern was is that when he was encouraged by his brother,  
23 brother-in-law and sister, to let me know and --

24 THE COURT: Yeah.

25 MR. DURKIN: -- which I think was significant, and

1 he was unable to do that, that's my -- that's the only  
2 observation I have at the moment. That's what concerns me.

3 THE COURT: Okay, Mr. Durkin. Thank you for  
4 bringing this to my attention.

5 MR. DURKIN: Thank you.

6 THE COURT: Any preferences for plowing ahead with  
7 deposition rulings or calling it a day?

8 MS. MORENO: I need to -- I've agreed that I would  
9 make the changes to the questionnaire and get them to the  
10 government, so I would frankly ask to be --

11 THE COURT: Sure.

12 MR. DRATEL: I think we all --

13 MS. MORENO: -- relieved.

14 THE COURT: And you certainly may. Mr. Cole?

15 MR. COLE: We would prefer to do the deposition  
16 another time as well only because we did not bring to court  
17 our stack -- I don't think the defense did either -- our  
18 stacks of everything.

19 THE COURT: Good enough.

20 MR. COLE: That said, we did have one last issue  
21 that we wanted to raise, your Honor.

22 THE COURT: Sure.

23 MR. COLE: And that is going back to the issue of  
24 expert -- expert witnesses, you might recall last time we  
25 were before your Honor, the last status conference, we raised

1 a concern that we had -- there was a name mentioned of a  
2 potential expert witness -- I think it was Mr. Samatar; the  
3 defense mentioned in the hearing that they might call Mr.  
4 Samatar as a witness -- I expressed concern about having  
5 received no notice, and you indicated I needed to receive  
6 notice right away, I think you said by the following day if I  
7 remember right, although I don't have the transcript in front  
8 of me.

9 THE COURT: Well, I remember, yeah, that notice had  
10 to be made or given forthwith, and I think I got assent from  
11 the defense either verbally or certainly by gesture. So  
12 what's the issue?

13 MR. COLE: We received a CV last -- this last week,  
14 nothing further, a CV. And maybe there's something that we  
15 were sent that we didn't receive, but all we have is a CV  
16 with no opinion or report or statement of what he may or may  
17 not say at trial.

18 THE COURT: Okay.

19 MR. DRATEL: If that's the case, your Honor,  
20 then -- I believed that we had sent a letter even before the  
21 day that we actually spoke when we were in court; I thought I  
22 had sent it earlier that day. I will go back. Maybe there's  
23 something that happened with that email, but I will do that  
24 immediately.

25 THE COURT: Would you? Thank you.

1 MR. DRATEL: Yes, and I apologize for that  
2 obviously.

3 THE COURT: Okay. Well, we've been at it for  
4 status now for about three hours. Anything else?

5 MR. DRATEL: Two brief things, your Honor. One  
6 just I am informed by my colleagues with respect to this  
7 al-Qaeda conversation with Sheikalow that the government  
8 thinks is Aden Ayrow, the translation that we provided the  
9 government back on November 6 has the word "terrorist"  
10 instead of al-Qaeda, so there may not even be an "al-Qaeda"  
11 mentioned at all based on our translator. So just wanted the  
12 Court to be aware of that.

13 Second is on the Section 5 CIPA submission, there's  
14 some logistical problems in getting that done back in New  
15 York. If I have to do it in the government's office by, you  
16 know, by hand, I'm going to do it by, you know, by sometime  
17 Monday if I can't do it before then. It's just a question of  
18 doing it in a secure place. I may have to do it without the  
19 document and do it from memory, but I will tee it up for your  
20 Honor as best we can.

21 THE COURT: Well, the motion has to be made though,  
22 as you know.

23 MR. DRATEL: Yes, that's why I'm saying a Section 5  
24 is going to be done -- it's not that the Court has to decide  
25 before a defense case, so, you know, we'll have time to argue



1 it but --

2 MR. COLE: No, I just want to make the Court  
3 aware -- probably the Court is aware -- if a Section 5 motion  
4 is made while trial is going on, that really could cause a  
5 problem in the proceedings because whatever the Court's  
6 ruling is in their motion, we can't just suddenly turn around  
7 and have a classified -- we cannot resolve an issue over  
8 classified information, as your Honor knows all the logistics  
9 involvement, just on the spot while the jury is out in the  
10 hallway. So I don't know what the Section 5 issue is he  
11 wants to raise, but I envision that if there is one raised,  
12 we're quite at a bad time spot to be raising it. I think the  
13 rule itself, the section itself has time periods that are  
14 usually in effect, but I don't know what the motion is about  
15 yet.

16 MR. DRATEL: It wasn't made available to us until  
17 two weeks ago to begin with, and I've been trying to get it  
18 done in a secure way like I'm supposed to do by communicating  
19 with the -- we're flying all over the country, so they have  
20 their own obligations, and I'm not faulting anyone for the  
21 fact this has come up, but I will -- and it may be by hand on  
22 paper, your Honor, but we'll get it to you by Monday.

23 THE COURT: Okay. We'll deal with what we have to  
24 deal with. If it's by hand, it better be legible; that's all  
25 I --

1 MR. DRATEL: I'm reminded by Ms. Fontier to just do  
2 it slowly, your Honor, big block letters.

3 THE COURT: Okay. Very good.

4 MS. FONTIER: I've been practicing reading his  
5 writing for five years, and I can't do it yet.

6 THE COURT: Maybe he was a doctor in his former  
7 life. Okay. Well, thank you all once again for your  
8 attention, and we'll next meet Monday morning one floor down,  
9 9 a.m., as soon as we can get all of our -- as soon as we can  
10 get the pool over.

11 MS. FONTIER: One further issue. What is the  
12 actual schedule, the times and -- I know you said two Fridays  
13 we have off, right, the 1st and the 15th?

14 THE COURT: Right, the 1st and 15th would be  
15 calendar days, the first and third Fridays, and then --

16 MS. FONTIER: And Monday is -- the 18th is also a  
17 holiday --

18 THE COURT: It is.

19 MS. FONTIER: -- and a four-day break there?

20 THE COURT: It is. It would be a four-day break,  
21 yes.

22 MS. FONTIER: Okay.

23 THE COURT: Normal trial hours, 9:00 to 12:00, 1:30  
24 to 4:30 -- we'll have plenty of time to go over this, but  
25 9:00 to 12:00, 1:30 to 4:30, standard recesses, 15 minutes

1 midmorning, 15 about midafternoon, we'll -- you know what the  
2 noon hour is. Sidebars down to an absolute minimum once  
3 we -- if we need to discuss matters that arise, we'll do it  
4 in nonjury time either before nine o'clock or after 4:30.  
5 And that's pretty much it in terms of how we're set up  
6 schedule-wise.

7 MS. MORENO: Does your Honor envision the -- that  
8 our clients need to be present Monday morning or Monday  
9 afternoon?

10 THE COURT: Well, it would be -- I can't remember a  
11 trial I had where the defendants were not present.

12 MS. MORENO: I'm sorry. I know that sounds like an  
13 ignorant question. I apologize.

14 THE COURT: Is there some reason that --

15 MS. MORENO: Well, it's about dressing them out.

16 THE COURT: Sure.

17 MS. MORENO: That's the question I had. In the  
18 past when I've done this, actually the jurors did it in a  
19 jury room, but --

20 THE COURT: The jurors? You mean the defendants?

21 MS. MORENO: No, no. The panelists, the  
22 prospective jurors filled out the questionnaires in a jury  
23 room, not in the courtroom, and so the accused were not  
24 anywhere present for that.

25 THE COURT: Yeah.

1 MS. MORENO: But in this case it's going to be  
2 different, correct?

3 THE COURT: Yeah, I think it is, and I gave that  
4 some thought as well. I don't think it would be  
5 appropriate -- either you have everybody there while the  
6 jurors are filling out their questionnaires or you have no  
7 one there. And by no one I mean no attorneys, nor am I at  
8 the bench, and would advise -- I've done this before -- I've  
9 advised the jury that while they're filling out a  
10 questionnaire or if they're doing some other business of a  
11 similar type, that they're going to have the privacy of the  
12 courtroom and that everybody basically leaves the courtroom.  
13 So either way. But I don't think it would be appropriate for  
14 the defendants to be out of the courtroom if all counsel are  
15 there and if I'm on the bench. Either way it works.  
16 Everybody there or no one there.

17 MS. MORENO: May I just have just a couple of  
18 minutes to confer with --

19 THE COURT: On this issue?

20 MS. MORENO: Yes. Because frankly, your Honor,  
21 speaking on behalf of Mr. Mohamud, I'm fine, while the jurors  
22 are filling out their questionnaires, not to be there. I  
23 mean -- in fact, I've never experienced the situation in many  
24 cases I've done where jurors are filling out questionnaires  
25 that the accused are ever in the same room with the jurors,

1 prospective jurors, filling out questionnaires. That's why I  
2 asked, and --

3 THE COURT: Well, it's not necessary. If you're  
4 asking me is it necessary for the defendants to be present  
5 when a questionnaire is being filled out, no; there's no  
6 court proceeding per se that's taking place.

7 MS. MORENO: But your Honor's saying you want it  
8 that way.

9 THE COURT: No, I'm saying if there was a desire  
10 for counsel to be present, then all of a sudden, you know,  
11 four people are missing from the courtroom and jurors start  
12 speculating -- and we do try to buttress the presumption of  
13 innocence and that individuals are not in custody -- you  
14 know, to the extent that's effective or not is open to  
15 speculation. But no, if we're leaving jurors to fill out  
16 their questionnaires after giving them the direction that  
17 they're to leave after turning their questionnaires in, we're  
18 not in session at that point, no business is being conducted,  
19 certainly no substantive business is taking place, and it's  
20 not necessary for the defendants to be there nor for the  
21 Court and counsel to be present. You want to take a minute  
22 or two and discuss this with your colleagues?

23 MS. MORENO: Please, your Honor, I really would  
24 appreciate that.

25 THE COURT: Okay. Sure.

1 MR. DURKIN: Judge, a question. I have not gotten  
2 any clothes for my client. I'm not -- I've frequently -- I  
3 don't agree with the -- the jumpsuits make a difference or  
4 that somehow clothing makes the presumption more likely, but  
5 if I choose to dress my client, is there a way I can get him  
6 clothes --

7 THE COURT: Sure.

8 MR. DURKIN: Do I give it to the marshal here or --

9 THE COURT: No, you don't give it to the marshals,  
10 you take it over to MCC. There's a whole protocol for that.  
11 You're going over there anyway to alert people over there  
12 that your client may need to be observed or looked at.  
13 They'll advise you of the protocol over there. But typically  
14 you get -- you get the clothing over there.

15 MR. DURKIN: He doesn't have to be dressed, does  
16 he?

17 THE COURT: Dressed out for trial? You don't want  
18 to dress him out?

19 MR. DURKIN: I don't think so.

20 THE COURT: Well, I've got to take a waiver then.  
21 I mean there's a protocol for that, and I'm going to take a  
22 waiver and I'm going to tell him what the risks --

23 MR. DURKIN: I'll think about it over the weekend.

24 THE COURT: -- of that are. But I do need to take  
25 that up with your client then.

1 MR. DURKIN: That's fine.

2 MS. MORENO: Your Honor, I don't know how the  
3 government feels about this, but certainly all defense  
4 counsel would waive their presence and the presence of their  
5 clients while the jurors are filling out the questionnaire.

6 MR. COLE: We don't care either way, your Honor.  
7 Whatever -- I assume we'll all be here during the  
8 introductory stuff and explaining, and then if the Court  
9 would like us to leave while they're actually filling out the  
10 questionnaire, we have no problem with that.

11 THE COURT: That's fine. Okay. Everybody's in  
12 agreement on that one?

13 MR. COLE: Yes.

14 THE COURT: All right. Ms. Moreno?

15 MS. MORENO: I'm sorry, your Honor.

16 THE COURT: You've taken the pulse of your  
17 colleagues?

18 MS. MORENO: I've taken their temperature, yes,  
19 your Honor.

20 THE COURT: Okay. Mr. Dratel?

21 MR. DRATEL: The only issue would be if we're all  
22 here, including the defendants, and then the jurors fill out  
23 the questionnaires, we can't all leave -- the defendants  
24 really can't leave the same way, that's the problem I  
25 foresee. That's to telegraph in a certain way as to -- if we

1 broke maybe --

2 THE COURT: We deal with that -- we deal with that  
3 issue in every criminal case we have. We never -- we never  
4 have defendants brought out --

5 MR. DRATEL: Right.

6 THE COURT: -- in the presence of a jury, we never  
7 have them removed in the presence of the jury, and in every  
8 case they'll never see a defendant in custody in the hallway  
9 while the jurors are on break.

10 MR. DRATEL: Oh, I understand. It's just different  
11 moving 80 people out than 12, that's all.

12 THE COURT: Well, I'd like them all to be in one  
13 place, and frankly Courtroom 1 is the only courtroom that we  
14 have where that can be accommodated.

15 MR. DRATEL: Right. So what I'm saying is I'd  
16 rather them not be there at all than have a situation where  
17 80 jurors have to get up and leave while we clear the  
18 courtroom.

19 THE COURT: Okay. Very good. So I'll take that as  
20 agreement, Mr. Dratel.

21 MR. DRATEL: Yes.

22 THE COURT: Mr. Ghappour, you're in agreement as  
23 well?

24 MR. GHAPPOUR: Yes, your Honor.

25 THE COURT: Mr. Durkin is --



1 MR. DURKIN: Yes.

2 THE COURT: -- as I understand, and the government  
3 has no objection. All right. That's the way we'll handle it  
4 then. Okay. Thank you all. Have a good weekend. Mr.  
5 Dratel, all counsel, make sure your clients are dressed out  
6 Monday morning, so you've got to get clothes over to them --  
7 well, please deal with the MCC requirement and whatever --

8 MS. FONTIER: GEO. While we're on the subject of  
9 clothes, GEO doesn't allow you to bring like belts and shoe  
10 laces, so to the extent that -- I mean Mr. Moalin has lost a  
11 lot of weight in the time that he's been in custody, so he  
12 may require a belt, which I would just ask to be able to give  
13 to him in court.

14 THE COURT: Thank you. We'll see you Monday.

15 (The proceedings were concluded.)  
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Certificate of Reporter

I hereby certify that I am a duly appointed, qualified, and acting Official Court Reporter for the United States District Court; that the foregoing is a true and correct transcript of the proceedings had in the mentioned cause on the date or dates listed on the title page of the transcript; and that the format used herein complies with the rules and requirements of the United States Judicial Conference.

Dated February 1, 2013 at San Diego, California.

***Debra M. Henson***

/s/ Debra M. Henson (electronic)  
Debra M. Henson  
Official Court Reporter